TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 486

MADELEINE D. POWERS, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 7, 1940.

CERTIORARI GRANTED NOVEMBER 12, 1940.

SUPREME COURT OF THE UNITED STATES

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No. 486

MADELEINE D. POWERS, PETITIONER,

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INDEX.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1939.

No. 3546.

COMMISSIONER OF INTERNAL REVENUE,

PETITIONER FOR REVIEW,

v.

MADELEINE D. POWERS.

PETITION FOR REVIEW OF DECISION OF UNITED STATES BOARD OF TAX APPEALS.
DECISION, JANUARY 9, 1940.

RECORD ON PETITION FOR REVIEW.

SAMUEL O. CLARK, JR.,
ASSISTANT ATTORNEY GENERAL,
SEWALL KEY,
SPECIAL ASSISTANT TO THE ATTORNEY GENERAL,
for Petitioner.

RALPH G. BOYD,
ROGER E. ELA,
NUTTER, McCLENNEN & FISH,
for MADELEINE D. POWERS.

BOSTON:
PRINTED UNDER DIRECTION OF THE CLERK.
1940

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1939.

No. 3546.

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER FOR REVIEW,
v.
MADELEINE D. POWERS

RECORD ON PETITION FOR REVIEW.

[FILED IN CIRCUIT COURT OF APPEALS DECEMBER 5, 1939.]

DOCKET NO. 88229.

MADELEINE D. POWERS, PETITIONER,
v.
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

APPEARANCES.

For Taxpayer:
Ralph G. Boyd, Esq.

For Commissioner:
J. D. Head, Jr., Esq.
B. W. Royce, Esq.

DOCKET ENTRIES.

1937

Feb. 26 – Petition received and filed. Taxpayer notified. (Fee paid)

" 26 – Copy of petition served on General Counsel.

Apr. 14 – Answer filed by General Counsel.

" 16 – Copy of answer served on taxpayer.

Oct. 26 – Motion for circuit hearing at Boston, Mass. filed by taxpayer. 10/27/37 granted.

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Mar. 4 – Hearing set May 9, 1938 at Boston, Mass.

May 16 – Hearing had before Mr. Sternhagen on merits. Submitted. Stipulation of facts filed. Petitioner requests for rulings of law filed. Briefs due as per rules.

" 27 – Transcript of hearing of May 16, 1938 at Boston, Mass. filed.

Jun. 15 – Brief filed by taxpayer. 6/16/38 copy served.

Jul. 25 – Motion for leave to file the attached brief, brief lodged, filed by General Counsel. 7/26/38 granted.

Aug. 10 – Reply brief filed by taxpayer. 8/10/38 copy served.

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Jan. 9 – Memorandum findings of fact and opinion rendered, John M. Sternhagen, Div. 10. Decision will be entered for the petitioner.

" 9 – Decision entered, J. M. Sternhagen, Div. 10.

Mar. 29 – Petition for review by U. S. Circuit Court of Appeals (1) with assignments of error filed by General Counsel.

Apr. 7 – Proof of service filed by General Counsel. Taxpayer & Attorney.

May 23 – Motion for extension of time to July 27, 1939 to transmit and complete the record filed by General Counsel.

" 23 – Order enlarging time to July 27, 1939 to prepare and transmit record entered.

Jul. 24 – Motion for extension to Sept. 26, 1939 to prepare and transmit record filed by General Counsel.

" 24 – Order enlarging time to Sept. 26, 1939 to prepare and transmit record entered.

Sep. 20 – Motion for extension to Nov. 25, 1939 to complete and transmit record filed by General Counsel.

" 20 – Order enlarging time to Nov. 25, 1939 to complete and transmit record entered.

Nov. 17 – Certified copy of an order from U. S. Circuit Court of Appeals, 1st Circuit, granting the transfer of certain

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physical exhibits in lieu of reproduction thereof in the printed record filed.

Nov. 21 – Motion for extension to 12/28/39 to prepare evidence and transmit record filed by General Counsel.

" 21 – Order enlarging time to 12/28/39 to prepare and transmit record entered.

" 28 – Agreed statement of evidence lodged.

" 28 – Praecipe for record filed with proof of service thereon. No counter praecipe to be filed.

" 29 – Agreed statement of evidence approved and ordered filed.

[Title omitted.]

PETITION.

[Filed February 26, 1937.]

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (MT-ET-GT-758-35-Massachusetts) dated November 30, 1936, and as a basis of this proceeding alleges as follows:

1. The petitioner is an individual whose address is 316 Beacon Street, Boston, Massachusetts.

2. The notice of deficiency, a copy of which is hereto attached and marked "Exhibit A", was mailed to the petitioner on November 30, 1936.

3. The taxes in controversy are gift taxes for the calendar year 1935 in the sum of $4,134.52.

4. The determination of the taxes set forth in said notice of deficiency is based upon the following error:

The adoption of a basis of valuation based on costs rather than actual value at the date of the gift.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

The petitioner at various dates in December, 1935, made gifts of six insurance policies and reported such gifts in Form 709

setting forth as the value thereof the values of the respective policies at the respective dates of gift as follows:

Item 1	$12,360.00
Item 2	56,198.86
Item 3	23,271.30
Item 4	84,067.70
Item 5	20,790.73
Item 6	36,671.71

The determination of values upon which said deficiency is based is as follows:

Item 1	$13,967.40
Item 2	68,779.00
Item 3	27,204.80
Item 4	99,672.78
Item 5	22,671.60
Item 6	40,854.00

Under the provisions of Section 506 of the Revenue Act of 1932 as amended, the applicable statute, "If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift." The reported values, being the values at the respective dates of the gifts, are controlling and the provisions of Article 19(9) of the Regulations 79 as amended, even if in effect and otherwise applicable to the gifts here in question and purporting to require a basis of valuation based on cost rather than actual value at the date of the gifts, are not, in view of the clear and express provisions of the statute, a proper basis for changing the values reported by the petitioner.

Wherefore the petitioner prays that this Board may hear the proceedings with reference to the respondent's notice of deficiency and may determine that there is no deficiency.

RALPH G. BOYD,
Counsel for Petitioner,
161 Devonshire Street,
Boston, Massachusetts.

COMMONWEALTH OF MASSACHUSETTS,
COUNTY OF SUFFOLK, ss.

John M. Dry, being duly sworn, says that he is an attorney in fact of the petitioner above named; that the petitioner is at present sojourning outside the United States; that Exhibit B attached to this petition is a copy of the power of attorney under which he acts, that he acts under such power, that such power has not been revoked, that the petitioner is absent from the United States and that the grounds of his knowledge of the facts alleged in the petition are personal knowledge of the facts and personal examination of the papers involved; that he has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true.

JOHN M. DRY.

Subscribed and sworn to before me this twenty-fifth day of February, 1937.

EDWARD WILLIAMSON,
[SEAL] *Notary Public.*
My commission expires December 23, 1937.

EXHIBIT A.

TREASURY DEPARTMENT WASHINGTON
Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and Refer To MT-ET-GT-758-35-Massachusetts Donor—Madeleine D. Powers

Nov. 30, 1936

Mrs. Madeleine D. Powers, 316 Beacon Street, Boston, Massachusetts.

Madam: A deficiency of $4,134.52 in your Federal gift tax liability for the calendar year 1935 has been determined after a review of the file in the case and a consideration of the protest against a deficiency proposed in a previous letter from this office.

The determination of the deficiency and the action of this office on the protest are fully explained in the attached statement.

This notice of deficiency is given in accordance with provisions of Section 513(a) of the Revenue Act of 1932 as amended by Section 501 of the Revenue Act of 1934, and a petition for a redetermination of the deficiency may be filed with the United States Board of Tax Appeals within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter. If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute and forward the enclosed Form 890A, waiving the restrictions on the immediate assessment and collection of the deficiency.

The submission of the waiver will expedite the closing of this case and will also benefit you by preventing the accumulation of interest charges, as the interest period terminates 30 days after the filing of the waiver or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

If within the 90-day period a petition has not been filed with the United States Board of Tax Appeals or the waiver, Form 890A, has not been submitted, the deficiency will be thereafter assessed.

Respectfully,

GUY T. HELVERING, Commissioner.

By: D. S. Bliss, Deputy Commissioner.

Enclosure: Waiver, Form 890A

MT-ET-GT-758-35-Massachusetts
Donor—Madeleine D. Powers

STATEMENT

In Bureau letter of July 7, 1936, a deficiency of $4,134.52 in your Federal gift tax liability was tentatively determined for the calendar year 1935.

Your protest, which was made the subject of a conference in this office on September 30, 1936, with your representative, is directed against the values tentatively determined for the following mentioned single premium insurance policies which you transferred by gift on December 30, 1935 and December 31, 1935:

Schedule A—1935 Return

Item 1—Policy No. 532838—The Fidelity Mutual Life Ins., Co. —Date of issue—November 25, 1935.

Item 2—Policy No. 9114410—The Prudential Ins. Co. of America—Date of issue—December 4, 1935.

Item 3—Policy No. 5090777—The Mutual Life Insurance Co. of N. Y.—Date of issue—November 25, 1935.

Item 4—Policy No. 9114963—The Prudential Insurance Co. of America—Date of issue—December 5, 1935.

Item 5—Policy No. 887777—The Connecticut Mutual Life Ins. Co.—Date of issue—November 27, 1935.

Item 6—Policy No. 435395—Home Life Insurance Company—Date of issue—November 27, 1935.

Article 19(9) of Regulations 79, 1935 Edition, relating to gift tax under the Revenue Act of 1932, as amended and supplemented by the Revenue Acts of 1934 and 1935, provides that where a donor, owning a life insurance policy on which no further payments are to be made to the company, for example, a single premium policy or paid-up policy, makes a gift of the contract, the value of the gift is the amount which the company would charge for a single premium contract of the same specified amount on

the life of a person of the age of the insured. Since your age was the same on the dates of the respective gifts of the insurance policies as on the dates of issue, the values for gift tax purposes are the costs of such policies to you. Your protest is accordingly denied and the tentative findings are hereby made final as explained in the following computation:

Schedule A—1935

	Returned	Tentatively Determined
Item 1	$12,360.00	$13,967.40
Item 2	56,198.86	68,779.00
Item 3	23,271.30	27,204.80
Item 4	84,067.70	99,672.78
Item 5	20,790.73	22,671.60
Item 6	36,671.71	40,854.00
Item 7	1,047.50	1,047.50
Total gifts, 1935	$234,407.80	$274,197.08
Less: Exclusion	5,747.69	5,747.69
Included amount of gifts	$228,660.11	$268,449.39
Less: Specific exemption	50,000.00	50,000.00
Net gifts, 1935	$178,660.11	$218,449.39
Tax on net gifts	$11,279.41	$15,413.93
Tax assessed on return		11,279.41
Deficiency, 1935		$4,134.52

The deficiency bears interest at the rate of six per cent per annum from the due date of the tax, March 15, 1936, to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

EXHIBIT B.

Know all men by these Presents, that I, Madeleine D. Powers, of Boston, Massachusetts, hereby revoking all previous powers of attorney, do hereby make, constitute and appoint Ralph G. Boyd, Allison L. Newton, John M. Dry and any member of the firm of

Nutter, McClennen & Fish, all of Boston, and each of them separately, my true and lawful attorneys for me, and in my name, place and stead to prosecute, defend, adjust, settle and compromise all claims of the United States and/or the Commonwealth of Massachusetts against me for taxes and all claims by me against the United States and/or the Commonwealth of Massachusetts for abatement, credit or refund of any taxes erroneously assessed or collected, and in my behalf and in my name and stead to execute, make oath to and file any and all claims for abatement and/or credit and/or refund of, and/or returns relating to taxes imposed by the United States and/or the Commonwealth of Massachusetts, to institute suits, attend all conferences and hearings before Bureaus of the United States and/or the Commonwealth of Massachusetts, to inspect all tax returns, reports and any other papers on file with such Bureaus, relating thereto, giving and granting unto my said attorneys and each of them full power and authority to do and perform every act and thing requisite, necessary and proper to be done in the premises as fully to all intents and purposes as I might or could do, with full power of substitution and revocation.

In witness whereof, I have hereunto set my hand and seal this 1st day of August, 1936.

MADELEINE D. POWERS (SEAL)

State of Maine.

County of York. August 1st, 1936.

Then personally appeared Madeleine D. Powers to me personally known, who acknowledged this instrument to be her free act and deed.

Before me,

Walter L. Goodwin,

(NOTARIAL SEAL) Notary Public.

My Commission Expires Sept. 14, 1939

[Title omitted.]

ANSWER.

[Filed April 14, 1937.]

The Commissioner of Internal Revenue, by his attorney, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4. Denies the Commissioner erred as alleged in paragraph 4 of the petition. Denies the Commissioner committed any error in the determination of the deficiency.

5. Admits so much of paragraph 5 of the petition as alleges that the petitioner at various dates in December, 1935, made gifts of six insurance policies and reported such gifts in Form 709 setting forth as the value thereof the values of the respective policies at the respective dates of gift as follows:

Item 1	$12,360.00
Item 2	56,198.86
Item 3	23,271.30
Item 4	84,067.70
Item 5	20,790.73
Item 6	36,671.71

Admits further that the determination of values upon which said deficiency is based is as follows:

Item 1	$13,967.40
Item 2	68,779.00
Item 3	27,204.80
Item 4	99,672.78
Item 5	22,671.60
Item 6	40,854.00

Denies the remaining allegations contained in said paragraph.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied:

Wherefore it is prayed that the determination of the Commissioner be approved.

MORRISON SHAFROTH,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

FRANK T. HORNER,
Special Attorney,
Bureau of Internal Revenue.

[Title omitted.]

STIPULATION OF FACTS.

[Filed at Hearing May 16, 1938.]

It is hereby stipulated and agreed by and between the parties hereto through their respective attorneys of record that for the purpose of this proceeding only the following facts may be taken as true, without prejudice to the right of either party to introduce further testimony at the hearing of this case:

1. Madeleine D. Powers, the petitioner herein, purchased from the insurance companies listed below single premium policies of life insurance as follows:

Date of Issue of Policy	Name of Insurance Company	Policy Number	Name of Insured	Face Amount of Policy	Amount of Single Premium Paid
Nov. 25, 1935	The Fidelity Mutual Life Ins. Co.	532838	Madeleine D. Powers	$20,000.00	$13,967.40
Dec. 4, 1935	The Prudential Insurance Co. of America	9114410	Madeleine D. Powers	100,000.00	68,779.00
Nov. 25, 1935	The Mutual Life Insurance Co. of N. Y.	5090777	Madeleine D. Powers	40,000.00	27,204.80
Dec. 5, 1935	The Prudential Insurance Co. of America	9114963	Madeleine Powers	122,000.00	99,672.78
Nov. 27, 1935	The Connecticut Mutual Life Ins. Co.	887777	Madeleine Powers	28,000.00	22,671.60
Nov. 27, 1935	Home Life Insurance Company	435395	Madeleine Powers	50,000.00	40,854.00

It is agreed that the petitioner will offer in evidence at the hearing of this cause photostatic copies of said insurance policies and said photostatic copies may be received in evidence in lieu of the original policies.

2. At various dates in December, 1935, the petitioner made gifts of the life insurance policies listed in paragraph 1 of this stipulation as follows:

Date of Gift	Name of Insurance Company	Policy Number	Name of Insured
Dec. 30, 1935	The Fidelity Mutual Life Ins. Co.	532838	Madeleine D. Powers
Dec. 30, 1935	The Prudential Insurance Co. of America	9114410	Madeleine D. Powers
Dec. 30, 1935	The Mutual Life Insurance Co. of N. Y.	5090777	Madeleine D. Powers
Dec. 30, 1935	The Prudential Insurance Co. of America	9114963	Madeleine Powers
Dec. 30, 1935	The Connecticut Mutual Life Ins. Co.	887777	Madeleine Powers
Dec. 31, 1935	Home Life Insurance Company	435395	Madeleine Powers

3. It is agreed that during the period from November 25, 1935 to December 31, 1935 there had been no sufficient change in the age of the insured in any of the policies listed in paragraph 1 of this stipulation which would have required the payment of a single premium larger than those set forth in paragraph 1 for the issuance of like policies of life insurance during that period.

4. It is agreed that the cash surrender values and the reserves carried by the insurance companies in respect to the policies of life insurance listed in paragraph 1 of this stipulation on the respective dates of gift are as set forth in the following table:

Name of Insurance Company	Policy Number	Date of Gift	Cash Surrender Value on Date of Gift	Reserve Carried By Insurance Company at Date of Gift
The Fidelity Mutual Life Ins. Co.	532838	Dec. 30, 1935	$12,360.00	$12,672.02
The Prudential Insurance Co. of America	9114410	Dec. 30, 1935	56,198.86	60,917.84
The Mutual Life Insurance Co. of N. Y.	5090777	Dec. 30, 1935	23,271.30*	25,344.05
The Prudential Insurance Co. of America	9114963	Dec. 30, 1935	84,067.70	89,383.33
The Connecticut Mutual Life Ins. Co.	887777	Dec. 30, 1935	20,790.73	21,126.73
Home Life Insurance Company	435395	Dec. 31, 1935	3[illegible],671.71	37,728.33

* Cash surrender value when right to surrender first arose, discounted to date of gift.

5. At the respective dates of gift there were no accumulated dividends apportioned or credited, provisionally or otherwise, to, and no paid-up additions to, any of said policies.

6. It is agreed that for the purpose of this proceeding the Board may take judicial notice of the American Experience Table of Mortality.

7. On March 11, 1936 the petitioner filed with the Collector of Internal Revenue at Boston, Massachusetts a federal gift tax return for the calendar year 1935. It is agreed that the respondent will offer said federal gift tax return in evidence at the hearing of this cause, and that respondent may withdraw the said federal gift tax return from the Board's files and substitute a photostatic copy therefor.

8. On November 30, 1936, within the statutory period of limitation, the respondent sent to the petitioner by registered mail a notice of deficiency a true copy of which is attached to the petition herein as "Exhibit A".

RALPH L. BOYD,
Attorney for Petitioner.

J. P. WENCHEL,
Counsel for Respondent.

UNITED STATES BOARD OF TAX APPEALS.

Madeleine D. Powers, Petitioner,

v.

Commissioner of Internal Revenue, Respondent.

Docket No. 88229.

RALPH G. BOYD, Esq., for the petitioner.
JAMES D. HEAD, Jr., Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION.

Entered January 9, 1939.

Respondent determined a deficiency of $4,134.52 in petitioner's gift tax for 1935. Petitioner assails the use of the cost of six single premium insurance policies as their values for purposes of gift tax.

Findings of Fact.

In November and December, 1935, petitioner, a resident of Boston, Massachusetts, purchased six single premium policies of insurance, as follows:

Company and Policy Number	Date of Issue of Policy	Name of Insured	Face Amount of Policy	Amount of Single Premium Paid	Type of Policy
The Fidelity Mutual Life Ins. Co. No. 532838	11/25/35	Madeleine D. Powers	$20,000	$13,967.40	Ordinary Life
The Prudential Ins. Co. of America No. 9114410	12/4/35	Madeleine D. Powers	100,000	68,779.00	Ordinary Life
The Mutual Life Ins. Co. of N. Y. No. 5090777	11/25/35	Madeleine D. Powers	40,000	27,204.80	Ordinary Life
The Prudential Ins. Co. of America No. 9114963	12/5/35	Madeleine Powers	122,000	99,672.78	10-Yr. Endowment
The Connecticut Mutual Life Ins. Co. No. 887777	11/27/35	Madeleine Powers	28,000	22,671.60	10-Yr. Endowment
Home Life Ins. Co. No. 435395	11/27/35	Madeleine Powers	50,000	40,854.00	10-Yr. Endowment

In December, 1935 petitioner made gifts of the policies having a cash surrender value and reserve carried against them on the date of gift, as follows:

Company and Policy Number	Date of Gift	Cash Surrender Value on Date of Gift	Reserve Carried by Ins. Co. at Date of Gift
The Fidelity Mutual Life Ins. Co. No. 532838	12/30/35	$12,360.00	$12,672.02
The Prudential Ins. Co. of America No. 9114410	12/30/35	56,198.86	60,917.84
The Mutual Life Ins. Co. of N. Y. No. 5090777	12/30/35	23,271.30*	25,344.05
The Prudential Ins. Co. of America No. 9114963	12/30/35	84,067.70	89,383.33
The Connecticut Mutual Life Ins. Co. No. 887777	12/30/35	20,790.73	21,126.73
Home Life Ins. Co. No. 435395	12/31/35	36,671.71	37,728.33

*Cash surrender value when right to surrender first arose, discounted to date of gift.

The policies in which petitioner was named as the insured were payable at the outset to petitioner's husband, George H. Powers, if living, and the policies in which her daughter, Madeleine Powers, was named as the insured were payable to petitioner if living, otherwise to the insured, the estate of the insured, or the estate of petitioner. Petitioner retained the right to change the beneficiaries of the policies in which she was named as the insured. The gifts were in the form of irrevocable assignments to petitioner's husband and the Massachusetts Hospital Life Insurance Co., as trustees. At the time of the issuance of the policies petitioner was fifty-seven and her daughter twenty-one years of age. During the period from November 25 to December 31, 1935, there was not a sufficient change in the age of the insured in any of the policies to require, for the issuance of like policies during that period, the payment of larger single premiums than those paid by petitioner. At the respective dates of gift there were no accumulated dividends apportioned or credited to any of the policies, provisionally or otherwise, and no paid-up additions to the policies. In calculating the reserves in this case the companies used the American Experience Table of Mortality with 3 per cent or 3½ per cent interest.

In the case of a single premium policy the cash surrender value during the first year in which the policy is outstanding is always less thar the reserve. The cash surrender value is the reserve for

the policy less a surrender charge, and varies with the different companies and policy years. The surrender charge and premiums actually paid in the particular year account for the difference between the reserve and cash surrender value on a particular policy. The discouragement of surrenders is one of the reasons for the surrender charge. Part of the surrender charge is placed in a contingency reserve to meet adverse mortality and interest expense over a period of years.

Premium exceeds the reserve at the outset by the amount of expenses which include commissions, taxes, medical fees, cost of issuing the policy and placing it on the books, and the inspection fee.

With respect to Prudential Policy No. 9114410, interpolating between the initial reserve of $60,833 for $100,000 of insurance at the age of fifty-seven and $62,024, the terminal reserve, at the age of fifty-eight, the total interpolated reserve as of December 30, 1935, twenty-six days after the issuance of the policy, was $60,-917.84. The single premium charged at the outset, $68,779, included the amount necessary to maintain the company's reserves, plus all costs of management and commissions, commonly called loading charges. On the date of gift none of the companies in this case would have paid to the owner of the policy the amount of the reserve against the policy. The Prudential Insurance Company of America, not having an absolute obligation to pay the cash surrender value during the first year, would have granted the discounted value of the first year cash surrender value, as of the date of the gift. Discounting the cash surrender value at 3½ percent, the amount of the gift in the case of Prudential Policy No. 9114410 would be $56,076.94.

The six policies here involved are in such form that they could be readily assigned, whether or not the assignee might have an insurable interest. Banks and insurance companies make loans on insurance policies, the latter generally charging a higher rate of interest. To insurance companies the loan value of a policy is equal to its cash surrender value, except that some companies deduct the interest charge from the loan at the start. A bank will

generally loan up to 90 percent of the cash surrender value, and in some cases up to the full cash surrender value.

A bank will not loan in excess of the cash surrender value where the policy is the only collateral. Individuals frequently buy insurance policies for investment but corporations do not.

On March 11, 1936, petitioner filed with the Collector of Internal Revenue at Boston, Massachusetts, a federal gift tax return for the calendar year 1935.

The total value of the gifts when made in 1935 was $233,360.30.

OPINION.

STERNHAGEN: After reading the stipulation and evidence and considering the briefs of the parties, we are unable to find any reason for arriving at a different conclusion from that reached in *Ernest A. Cronin,* 37 B.T.A. 914, and *Mary H. Haines,* 37 B.T.A. 1013, both of which are now pending on review in the Circuit Court of Appeals for the Third Circuit. The petitioner in her gift tax return valued the gifts at $233,360.30, the cash surrender value of the policies at that time. The Commissioner increased the value to $273,149.58 by using the total amount of single premiums paid by petitioner a short time before the gift. The aforesaid decisions held the Commissioner to have been in error in those cases, and we follow them in holding here that the cash surrender value is to be used as the value of the gift.

Enter:

Decision will be entered for the petitioner.

[Title omitted.]

DECISION.

Entered January 9, 1939.

In accordance with the Board's memorandum findings of fact and opinion, entered January 9, 1939, it is

Ordered and decided that there is no deficiency in gift tax for 1935.

Enter:

JOHN M. STERNHAGEN, *Member.*

[Title omitted.]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR.

[Filed March 29, 1939.]

To the Honorable Judges of the United States Circuit Court of Appeals for the First Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, James W. Morris, Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Ralph F. Staubly, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue, appointed and holding office by virtue of the laws of the United States; that Madeline D. Powers (hereinafter referred to as the donor), a citizen of the United States, resides at 316 Beacon Street, Boston, State of Massachusetts; that the donor filed her gift tax return for the calendar year 1935 with the Collector of Internal Revenue for the District of Massachusetts, whose office is located in Boston, Massachusetts, which is within the jurisdiction of the United States Circuit Court of Appeals for the First Circuit.

The court in which the review of this proceeding is sought is the United States Circuit Court of Appeals for the First Circuit.

II.

The nature of the controversy is as follows, to wit:

The gift tax return filed by the donor for the calendar year 1935 disclosed a tax liability of $11,279.41 The donor included in said return, as the subject of gifts by her to named beneficiaries, certain single premium life insurance policies at a value based upon the cash surrender value of said policies as set forth in the schedule incorporated in each of said policies.

Under date of November 30, 1936 the Commissioner of Internal Revenue mailed a notice to the donor asserting a deficiency in the

gift tax for the calendar year 1935 in the amount of $4,134.52. In determining said deficiency the Commissioner included said insurance policies in the amount of the total gifts made by the donor at a value representing the cost or premiums payable for such or like policies as of the date of the gifts.

Under date of February 26, 1937, the donor filed a petition with the United States Board of Tax Appeals for a redetermination of the deficiency in the tax above mentioned, and after the answer of the Commissioner of Internal Revenue was duly filed, the case was submitted to the Board of Tax Appeals for decision on the basis of the pleadings, a stipulation of facts and certain exhibits offered and received in evidence and the testimony of sundry witnesses called on behalf of the donor. The memorandum opinion and interlocutory decision was entered January 9, 1939 and the final order of the Board of Tax Appeals, redetermining the deficiency, was entered January 9, 1939, in which it was ordered and decided that there was no deficiency in gift tax for the year 1935.

The Board of Tax Appeals in holding and deciding that there was no deficiency in the tax, as aforesaid, determined that, for the purposes of the tax, the value of the aforesaid single premium life insurance policies, as of the date of the gift, was the value at which said policies were returned by the donor, and which was based upon the cash surrender value thereof.

III.

The Commissioner of Internal Revenue being aggrieved by the conclusions of law contained in the decision of the Board of Tax Appeals and by its order of redetermination, desires to obtain a review thereof by the United States Circuit Court of Appeals for the First Circuit.

The Commissioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in holding and deciding and finding as a fact that the fair market value for gift tax purposes of single premium insurance policies was the cash surrender value thereof as of the date of the gift of such policies; there being no substantial evidence to support such finding of fact.

2. The Board of Tax Appeals erred in not holding and deciding and finding as a fact that the fair market value for gift tax purposes of single premium life insurance policies was not the cash surrender value thereof as of the date of the gift.

3. The Board of Tax Appeals erred in holding and deciding and finding as a fact that the fair market value for gift tax purposes of single premium life insurance policies was not the amount of the premium payable for such or like policies as of the date of the gift.

4. The Board of Tax Appeals erred in not holding and deciding and finding as a fact that the fair market value for gift tax purposes of single premium life insurance policies was the amount of the premiums payable for such or like policies as of the date of the gift; as shown and established by the evidence adduced.

5. The Board of Tax Appeals erred in entering its final order of redetermination that there is no deficiency in gift tax for the calendar year 1935, instead of a deficiency of $4,134.52, as determined by the Commissioner.

6. The Board of Tax Appeals erred in failing and refusing to enter a final order of redetermination that there is a deficiency in gift tax for the calendar year 1935 in the amount of $4,134.52, as determined by the Commissioner, instead of no deficiency in the gift tax.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the First Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said court and transmitted to the clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

JAMES W. MORRIS,
Assistant Attorney General.

J. P. WENCHEL, RLW,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

RALPH F. STAUBLY,
Special Attorney, Bureau of Internal Revenue.

UNITED STATES OF AMERICA,
DISTRICT OF COLUMBIA, ss.

Ralph F. Staubly, being duly sworn, says that he is a special attorney in the Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

RALPH F. STAUBLY,
Special Attorney.

Sworn and subscribed to before me this twenty-eighth day of March, 1939.

GEORGE W. KRIES,
Notary Public.

My commission expires November 15, 1942.

[Title omitted.]

NOTICE OF FILING PETITION FOR REVIEW.

[Filed April 7, 1939.]

To RALPH G. BOYD, Esq., *161 Devonshire Street, Boston, Massachusetts:*

You are hereby notified that the Commissioner of Internal Revenue did, on the twenty-ninth day of March, 1939, file with the clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the First Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this twenty-ninth day of March, 1939.

J. P. WENCHEL, RLW,
Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this first day of April, 1939.

RALPH G. BOYD,
Attorney for Respondent on Review.

[Title omitted.]

NOTICE OF FILING PETITION FOR REVIEW.

[Filed April 7, 1939.]

To Mrs. MADELINE D. POWERS, *316 Beacon Street, Boston, Massachusetts:*

You are hereby notified that the Commissioner of Internal Revenue did, on the twenty-ninth day of March, 1939, file with the clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the First Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this twenty-ninth day of March, 1939.

J. P. WENCHEL, RLW,
Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this third day of April, 1939.

MADELINE D. POWERS,
Respondent on Review.

[Title omitted.]

STATEMENT OF EVIDENCE.

[Filed November 29, 1939.]

The following is a statement of evidence in narrative form in the above-entitled cause. This cause came on for hearing before the Honorable John M. Sternhagen, member of the United States Board of Tax Appeals, on May 16, 1938. Ralph G. Boyd, Esq., appeared for the petitioner (respondent on review), and J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, by James D. Head, Jr., Esq., appeared for the Commissioner of Internal Revenue.

In addition to the testimony, there was a stipulation of facts that is being made a part of the record on appeal.

At the hearing, before any witness was called, it was agreed that the only question in controversy is as to the proper method of arriving at the values to be used as the measure of the gift tax with reference to a gift of certain life insurance policies. Before any witness was called, the following exhibits were introduced in evidence:

[Petitioner's Exhibits 1 to 6 inclusive—the life insurance policies involved.

[Respondent's Exhibit A—Gift tax return covering the gift involved.]

Photostatic copies of all of the foregoing exhibits are attached hereto.

Thereupon DONALD B. CHENEY, a witness called on behalf of the petitioner, after being first duly sworn, testified as follows:

I live at 21 Bodwell Terrace, Millvale, New Jersey. I am employed by the Prudential Insurance Company of America at their home office in Newark, New Jersey, and I am a mathematician in the Actuarial Department of that company. I have examined the two Prudential policies and the other policies involved in this proceeding. I have been employed in the Actuarial Department of the Prudential for thirteen years. During that time I have become

a Fellow, by examination, of the American Institute of Actuaries and also the Actuarial Society of America.

I am familiar with the practice in setting up reserves for life insurance policies and in particular on single-premium life policies and ten-year endowment policies. Ordinarily, the reserve under a policy is that amount which, if invested now, must be sufficient at some future time to pay the death claim under that policy, or to members of that group of policies, as such claims become due.

The entire premium paid by an insured on the issuance of a policy is termed the gross or office premium, and is composed of two parts:

> "The one part constitutes the loading, for expenses, such as commissions, taxes, medical fee, cost of issuing policy and placing it on the books, inspection fee, and so forth. The other part of the premium is used to set up the reserve under the policy, and that premium must be based on a certain mortality table, and a certain assumed rate of interest that is going to be earned under the policy. That is, the net single premium is to be invested at a certain rate of interest in order to pay the benefits as they fall due in the future."

Ordinarily, the American Experience Table of Mortality is used, with either 3 per cent or 3½ per cent interest. In our particular case we use the American Table of Mortality with 3¼ per cent interest or the American Experience Table of Mortality with 3½ per cent interest, whichever gives the higher reserve. In this particular case we used 3¼ per cent interest. We have been using the 3¼ per cent rate since January 1, 1935. Prior to that we used 3½ per cent. The rate is determined by the average rate we estimate can be conservatively obtained over a period of years. That is the general practice with all other companies. The rate applicable to a policy throughout its life is stated in the policy.

The cash surrender value is usually lower than the total initial premium paid. The cash surrender value is calculated by taking

a certain percentage of the reserve under the policy and is lower than the reserve in the case of a single-premium policy during the first year that the policy is outstanding.

"*Q.* 1. Now, what accounts for the difference between the cash surrender value and the reserve? *A.* Ordinarily, a life insurance policy is issued for the primary purpose of paying a claim later on. It may be a death claim or a matured endowment. If an insured decides that he needs the cash surrender value of his policy and wants to discontinue his insurance, he may surrender the policy and receive whatever cash value is available at that time. If this is done, a charge is composed on the full reserve, and the balance is known as the cash surrender value. A certain part of that reserve is placed in the contingency reserve to take care of adverse mortality fluctuations, and adverse fluctuations in the interest rate. For example, a life insurance (company), probably is not earning three per cent on its new investments, although it guarantees three per cent interest under its policies, or three and one-quarter per cent or three and one-half per cent, depending on the company."

There is a difference in calculating the reserve for life policies and endowment policies. Under the life policy the insurance is payable only upon the death of the insured, so that the reserve we hold at any one time is simply the present value of an amount sufficient to pay this death claim as it falls due. Under an endowment policy there is another element;—not only the death claim to be paid during the endowment period, but also endowment insurance claims to be paid at the end of the endowment period to all those fortunate enough to survive.

The Prudential Policy No. 9114410 contains at the bottom of the second page a provision, under which the reserve for the policy would be figured, which starts as follows: "The cash surrender and loan values set forth in the above table from the third year on, in each case, based on the full reserve according to the Ameri-

can Experience Table of Mortality, with interest at three and one-half per cent. per annum, less a surrender charge . . . ". During the first three-year period the reserve is calculated in exactly the same manner. It is rather a peculiar situation here. It is usual under most ordinary life policies that there isn't any cash value available until the end of three years. However, under the single-premium life and endowment policies there is a cash value available at the end of one year, and that cash value is based on some table of mortality and an interest rate specified in the policy. The situation is exactly the same under the other Prudential policy (No 9114963). In Connecticut Mutual Policy No. 887777 there is a paragraph headed "Reserves" on what appears to be the second page which covers the basis for calculating the reserves under that policy. In the Mutual Life Insurance Company policy there is a paragraph headed "Reserves" on the third page which covers the basis of calculation of reserves under that policy. In the Fidelity Mutual policy there is a section entitled "Cash Values" on page 4 which covers the basis for the calculation of reserves on that policy. In the Home Life policy on the second page there is a paragraph headed "Reserve Basis" which covers the method of computing the reserve under that policy. The maximum rate at which the computation of the reserve is made on these policies is 3½ per cent interest and the minimum rate is 3 per cent. The lower the interest rate, the larger will be the reserve. In other words if you set out to accumulate a certain amount of money, the lower the interest rate to be credited each year, the larger the amount you have to invest in order to accumulate that certain amount of money at the end of a certain period.

The loading charges, to which reference has been made, are made up of various items including commissions, taxes, etcetera. The figures reflecting those items do not appear in the reserve. They are in that portion of the overlay above the reserve. There is a provision for expenses in the office premium, which is the difference between the reserve at the outset and the total premium charges. In our case the cash surrender value would be less than

the reserve except that the cash surrender value at the time of the endowment would be the same. During the first year of the policy the cash surrender value would be smaller; that would be true in every case.

"*Q.* 2. If you should take the four per cent rate in accordance with the tables set out in the regulations and apply it, use that figure in your computation, you would arrive at figures as of the date of the gift, larger or smaller or identical with the cash surrender value of each of these policies? *A.* Smaller, because they are based on a larger rate of interest.

"*Q.* 3. And that would bring it below the cash surrender values in each case? *A.* That is right."

Cross Examination.

The reserve is an asset specifically set aside by the company to meet a liability on a particular policy as it falls due. The reserves constitute the insurance company's investment fund. The company expects, by investing this money, considering the class of claims as a whole, to have enough to be able to pay all claims when they come due.

"*Q.* 4. Just how do you compute the single premium on life insurance policies, Mr. Cheney? Let us take Prudential Policy No. 9114410, for instance. Do you have any computation showing how you arrive at that single premium? *A.* Yes, I have. This policy was issued at age 57 on the single payment life plan in the amount of $100,000 of insurance, the date of issue being December 4, 1935. There are actuarial tables—from the actuarial tables we find that the net single premium for this type of policy at age 57 is $608.33 per thousand. The net single premium at age 58 is $620.24 per thousand, or on the basis of $100,000 of insurance, the figures are respectively, $60,833 and $62,024. I find that these policies were in force 26 days before they were transferred as a gift. To find the interpolated reserve . . . we interpolate between reserves at 57 and 58 to find out what the reserve would be

at the end of 26 days after the policy was issued, and we find that the total interpolated reserve as of December 30, 1935 was $60,917.84,"

The reserve immediately after the policy becomes effective is called the initial reserve and the reserve at the end of the policy year is called the terminal reserve. When you wish to determine the amount of reserve in between the initial and terminal reserve, you use the method of the interpolating reserve. To shorten the matter, the single premium charge is worked out on a mathematical formula worked out by the insurance companies on the basis of experience that will give a sum sufficient to maintain the reserve, to pay the insurance agent's commission for writing the policy, and the costs of management of the policy and investments up to the time the claim matures, and other loading charges. That is all comprised in the single premium that is charged the insured for the policy. The reserves increase from year to year as time goes on. At the very outset, the reserve on the policy is invested at a certain rate of interest. At the end of each year that interest is added to the principal, and from that is deducted the cost of insurance for that particular policy for the year. The net result is the reserve under that policy at the end of a year. The reserve increases as a result of these dividend credits which are added at the end of each year. There is a certain time in the life of a single-premium policy where the reserve equals or exceeds the single premium. In general, on single-premium policies, there is a cash surrender value at the end of the first year and each year thereafter.

"The Member: Are there some single premium policies which have no cash surrender value for more than a year after issuance?

"The Witness: There might be some single premium straight term policies which have no cash surrender value at all, or at least until the end of three or five years; but that is not the type of policy we are talking about here today. We are talking about single payment life insurance policies and single payment endowment policies."

By Mr. Head:

Ordinarily, under single-premium policies, there is no cash surrender value until the policy is in force for one year. The cash surrender value is nothing more or less than the reserve for the policy, minus the surrender charge. The surrender charge varies with the different companies and for the different policy years. One of the reasons for the surrender charge is to discourage surrender of the policy. It costs the company money to put the policy on their books and they make their investments accordingly. If the policy is surrendered they are put to the expense of placing that policy again, and there is a possibility of loss—when a policy is surrendered we have to sell securities to get sufficient funds to pay the cash surrender value. In times of stress we may be forced to sell those securities at a loss so that some surrender charge must be imposed. I mean that part of the surrender charge is placed in a contingency reserve for adverse mortality experience and adverse interest experience over a period of years. When a person buys a single-premium life insurance policy, the insurance company contracts that it will immediately set aside a certain amount of reserve and will invest and reinvest that sum and guarantee to the policy-holder the success of those investments, so that when his claim matures he will receive the full face amount of his claim.

"*X-Q.* 5. Supposing for a moment that instead of the cash surrender value the insurance company would permit the policy holder to surrender his policy in the first year—having taken out that amount of the reserve, it would be impractical for the policy holder to take that reserve and invest it himself over a period of years, and expect to come up at the time the claim would mature with the same amount the insurance company would pay, would it not? *A.* I think it would be impracticable. As you say, the mortality table anticipates a certain number of deaths during the first year, during the second year and so on. If a man invests a certain amount of money and does not live out the expection of life, that amount

would not accumulate to the full amount of the insurance at the time of his death, but only on the average. The expectation of life is the average lifetime, beginning at a certain age

"*X-Q.* 6. In addition, he would have the risks of management, risks of loss; risks of that sort which he does not have in an insurance policy? *A.* That is right.

"*X-Q.* 7. So he has a contract with the insurance company which is more valuable than merely the amount of the reserve maintained. Would you say that that is a fair statment? *A.* Life insurance itself is a cooperative plan whereby a large number of individuals are insured. Insurance is based on the law of averages. It is based on certain rates of interest being earned in the future, certain rates of mortality being experienced, and because of this operation of the law of averages an individual in the group does have more security than if he planned to set up some such premium that would pay this insurance on his own life.

"*X-Q.* 8. And the cost of this service of management and this guarantee of success of investment so that the policy holder can be assured of getting the full amount of his claim when it matures is included in the amount of the single premium? *A.* Yes. It is included in there, but, as I said before, it is based on the operation of the law of averages and the spread of risk."

Redirect Examination.

On the day of these gifts none of the six companies would have paid to the owner of any of the policies the amount of reserve against the policies. The figure that our company would have paid would have been the discounted value of the first year cash surrender value, as of the date of the gift. In our case, if you take the cash surrender value of policy No. 9114410 and discount it at 3½ per cent interest the amount of the gift on that policy on that basis would be $56,076.94. In any case where we do not have an absolute obligation to pay the cash surrender value during the

first year, it is discounted back at the stipulated rate. The one great element increasing the reserve each year as it goes along is the interest earned and credited from year to year. In a sense, the computation of the reserve on a single-premium policy takes into consideration the same elements involved in an annual payment policy, but we do not have to consider the present value of future premiums to be collected under single-premium policies because the full premium has been collected in advance. The difference between the reserve and the cash surrender value on a particular policy is accounted for by the premiums actually paid and the surrender charge under the policy for that particular year.

Thereupon, TRESSLER W. CALLIHAN, a witness called on behalf of the petitioner, being the first duly sworn, testified as follows: I live at 110 Cedar Street, Newton Centre, Massachusetts. My present position is that of general agent in Boston of Home Life Insurance Company of New York. I have been in the insurance business since 1922, starting as an agent, general agent, home office official and I am now running my own office. As home office official, I was connected with the John Hancock Insurance Company. I am now an insurance agent as well as a general agent. In the course of my business I deal generally with life insurance policies. I have frequently arranged for loans on insurance policies, acting on behalf of the policy holder.

I am familiar with the six policies involved in this proceeding and have examined them to see whether they are in such form that they could be readily assigned. They are readily assignable. It would make no difference whether the assignee had an insurable interest in the insured.

Policies are assigned as security for loans. From my experience there have been only two sources from which loans could be obtained on that basis and with that security, banks and insurance companies. At the present time there is a difference in rates as between the two sources. Insurance companies, in general, charge six per cent. It is possible to obtain a lower rate from banks. I have had no experience with private lenders but I know of situa-

tions in which I have not participated in which private lenders have loaned. To my knowledge, insurance policies are not generally bought and sold (as distinguished from loan transactions) except by insurance companies themselves, *i.e.,* in the case of an actual surrender. The cash surrender value and the loan value of a policy, so far as the insurance company is concerned, is identical, except that some companies may deduct the interest charge from the loan at the start. Substantially, the cash surrender value and the loan value is identical. From my experience banks will make loans up to 90 percent of the cash surrender value, and never exceeding the maximum cash surrender value. There are cases where the banks would lend to the full cash surrender value. Never in my experience would a bank lend to any figure in excess of the cash surrender value. I am familiar with various situations in which policies have been assigned, in my experience, for value. I have been engaged in transactions in which policies have been assigned by one person to another. There is a case going through today where an individual is making a loan of $38,000 on life insurance policies where the cash value just is in excess of $40,000. The loan is going through a bank and the bank is making this as the limit it will take on this particular contract.

"*Q.* 1. Have you had any transaction in which the value—whatever the manner for determining it, was in excess of the cash surrender value? *A.* I have not.

"*Q.* 2. Have you had any occasion in which it was less than the cash surrender value? *A.* The case I just mentioned.

"*Q.* 3. That is a loan? *A.* Yes.

"*Q.* 4. But the case of a transfer not involving a loan where there was occasion to determine the value, was it ever determined at a figure other than the cash surrender value? *A.* Not in my experience."

People quite frequently buy insurance policies for investment. In my experience corporations do not buy them for investments or with the expectation of taking the cash surrender value prior to

maturity; I know of cases where individuals have bought policies for those purposes. In my own experience, in buying policies as investments, we sell them to carry through either to maturity or to death.

"*Q.* 5. What, Mr. Callihan, in your experience, is the highest amount a person may obtain for an insurance policy? *A.* The cash surrender value."

Cross Examination.

"*X-Q.* 6. Mr. Callihan, you never knew the banks to make a practice of loaning money over the full amount of the value of the collateral on anything, did you? *A.* Well, I have seen it done, yes.

"*X-Q.* 7. You have? What was the transaction, if you will give us the details? *A.* Government bonds.

"*X-Q.* 8. You have seen a bank lend 100 per cent on a government bond? *A.* In one instance.

"*X-Q.* 9. That is interesting. When did that transaction occur, and what were the circumstances? *A.* It was a personal loan.

"*X-Q.* 10. To one of the bank officials? *A.* To yours truly, to myself.

"*X-Q.* 11. Mr. Callihan, do you wish to tell his Honor by your testimony that an insurance policy is not worth what the company sells it for? *A.* I will answer the question this way: that in dollars and cents, from the standpoint of the individual who purchases the policy, at the time he purchases it if he wanted to get back immediately the amount of money he put into the contract, it is not worth what he put into it because he cannot get that money back.

"*X-Q.* 12. But you do not wish to tell his Honor that a contract of insurance a policy holder purchases from a company is not worth fully what the company charges him for? *A.* If we figure the protection. We feel that in buying the protection, he has paid for so much for protection on the contract.

"X-*Q*. 13. On direct examination you were confining yourself to what the policy holder could realize on a policy on a forced sale or a loan? *A*. I should not say a forced sale. Sometimes they take cash surrender value not on a forced sale; what they could realize if they wanted the cash immediately."

Thereupon, HENRY K. WHITE, a witness called on behalf of the petitioner, after being first duly sworn, testified as follows:

I live at 250 Beacon Street, Boston. I am assistant cashier, First National Bank, Boston. My duties as an officer of the bank include passing on loans, including loans on insurance policies. Generally speaking, loans are made on insurance policies up to 90 per cent of the cash surrender value which is available at the time the loan was made. In determining that figure we take into consideration the credit of the borrower to the extent that on a 90 per cent basis the credit of the borrower is considered only with relation to the term for which the loan is required or may be carried. From the point of actual protection to the bank, the moral hazard is not a factor.

"*Q*. 1. Do you—does the bank ever loan in excess of the cash surrender value of the policy. *A*. In a transaction where the possible death benefits of the policy are considered.

"*Q*. 2. That is—will you explain that a bit? *A*. There are loans that may be made to an individual or a corporation which are secured by life insurance policies. We consider that the maker is good so long as he lives and will repay without necessarily having to put up any liquid collateral. On the other hand, in the event of his death, because he may be an important officer in the corporation, or merely an individual borrowing in his own name, he might not be able to pay the note, and therefore the protection to the bank is given in the form of death benefits payable under the policy.

"*Q*. 3. Where the only element involved is the adequacy of the collateral and the only collateral given is the insurance

policy, do you ever loan in excess of the cash surrender value? *A.* No, sir."

I am familiar with the general practice in New England with respect to this type of transaction. The practice conforms to the policy of our bank as above testified. Loans by banks on insurance policies are becoming more common.

"*Q.* 4. What relation do the interest rates which the banks normally charge on this type of loan bear to the 6 per cent rate stipuated in the policy? *A.* At the present time the rates are approximately half, but that depends somewhat on the nature of the transaction.

"*Q.* 5. Is that a consideration having some bearing on this type of transaction in the banking business? *A.* I believe it has."

Cross Examination.

"X-*Q.* 6. In making loans, the bank ordinarily is concerned primarily with security, is it not? *A.* Yes.

"X-*Q.* 7. And it is not the ordinary practice of the bank to loan up to the full value of the collateral deposited for a loan? *A.* No.

"X-*Q.* 8. The bank, ordinarily, fixes collateral at the amount which they believe they could realize if they had to liquidate it immediately? *A.* Yes."

Redirect Examination.

"*Q.* 9. Mr. White, in determining the amount which a bank will lend on an insurance policy, does the bank give any consideration to the reserve behind that policy? *A.* Yes, almost entirely.

"*Q.* 10. And, by reserve, you mean what? *A.* The cash surrender value.

"*Q.* 11. And does the bank give consideration to any figure other than the cash surrender value? *A.* No, other than in the type of commercial transaction where the death benefit is the principal factor of security."

We are willing to loan up to 90 per cent of the cash surrender value because we know there is security in the cash surrender value itself which will enable the bank to pay the loan if it is in default.

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

J. P. WENCHEL, RLW,
Chief Counsel, Bureau of Internal Revenue.

The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, as attorney for the respondent on review.

RALPH G. BOYD,
Attorney for Respondent on Review.

This statement of evidence is duly approved and settled this twenty-ninth day of November, 1939.

J. M. STERNHAGEN, *Member,*
United States Board of Tax Appeals.

[Title omitted.]

PRAECIPE FOR RECORD.

[Filed November 28, 1939.]

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the clerk of the United States Circuit Court of Appeals for the First Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the First Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board,

(a) Petition, including annexed copy of deficiency notice.

(b) Answer.

3. Memorandum findings of fact and opinion, and decision of the Board.

4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

5. Statement of evidence as settled and allowed.

6. Stipulation of facts filed May 16, 1938.

7. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record.

8. This praecipe.

J. P. WENCHEL, RLW
Chief Counsel, Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this thirteenth day of November, 1939. No counter-praecipe to be filed.

RALPH G. BOYD,
Attorney for Respondent on Review.

[Title omitted.]

CERTIFICATE.

I, B. D. Gamble, clerk of the United States Board of Tax Appeals, do hereby certify that the foregoing [typewritten] pages, 1 to 49, inclusive [printed pages 1 to 39, inclusive] contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this second day of December, 1939.

B. D. GAMBLE, *Clerk,*
United States Board of Tax Appeals.

[SEAL]

[MEMORANDUM. Orders of enlargement of time for docketing case to, and including, December 28, 1939, are here omitted. A. I. CHARRON, *Clerk.*]

ORDER OF CIRCUIT COURT OF APPEALS.

November 16, 1939.

Upon motion of petitioner for review, assented to, leave is granted to transmit five copies each of Petitioner's Exhibits 1 to 6, inclusive, and Respondent's Exhibit A, as physical exhibits, in lieu of reproduction thereof in the printed record on petition for review.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

[fol. 41] and was fully heard by the Court, Honorable Calvert Magruder and Honorable John C. Mahoney, Circuit Judges, and Honorable George C. Sweeney, District Judge, sitting.

Thereafter, to wit, on July 16, 1940, the following Opinion of the Court and Concurring Opinion were filed:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1939

No. 3546

COMMISSIONER OF INTERNAL REVENUE, Petitioner for Review,

v.

MADELEINE D. POWERS

Petition for Review of a Decision of the United States Board of Tax Appeals

Before Magruder, Mahoney and Sweeney, JJ.

OPINION OF THE COURT—July 16, 1940

SWEENEY, J.:

This case is before us on the petition of the Commissioner of Internal Revenue to review a decision of the Board of Tax Appeals, entered January 9, 1939, in which that Board ruled that there was no deficiency in the gift tax paid by the respondent for the year 1935.

In late November and early December, 1935, the respondent Madeleine D. Powers purchased six single premium policies of insurance as follows:

[fol. 42]

Company and policy number	Date of issue of policy	Name of insured	Face amount of policy	Amount of single premium paid	Type of policy
The Fidelity Mutual Life Ins. Co., No. 532838	11/25/35	Madeleine D. Powers	$20,000	$13,967.40	Ordinary Life
The Prudential Ins. Co. of America, No. 9114410	12/ 4/35	Madeleine D. Powers	100,000	68,779.00	Ordinary Life
The Mutual Life Ins. Co. of N. Y., No. 5090777	11/25/35	Madeleine D. Powers	40,000	27,204.80	Ordinary Life
The Prudential Ins. Co. of America, No. 9114963	12/ 5/35	Madeleine Powers	122,000	99,672.78	10-Yr. Endowment
The Connecticut Mutual Life Ins. Co., No. 887777	11/27/35	Madeleine Powers	28,000	22,671.60	10-Yr. Endowment
Home Life Ins. Co. No. 435395	11/27/35	Madeleine Powers	50,000	40,854.00	10-Yr. Endowment

In the policies on the life of Madeleine D. Powers, George H. Powers was named as the beneficiary, if living. In the policies on the life of Madeleine Powers, the respondent's daughter, the beneficiary was Madeleine D. Powers, if living; otherwise they were payable to the insured, the estate of the insured or the estate of the respondent. On December 30 and 31, 1935, the respondent made gifts of the policies in the form of irrevocable assignments to the respondent's husband and the Massachusetts Hospital Life Insurance Co., as trustees. At the time of the respective gifts the policies had cash surrender values and reserves carried against them as follows:

Company and policy number	Date of gift	Cash surrender value on date of gift	Reserve carried by Ins. Co. at date of gift
The Fidelity Mutual Life Ins. Co., No. 532838	12/30/35	$12,360.00	$12,672.02
The Prudential Ins. Co. of America, No. 9114410	12/30/35	56,198.86	60,917.84
The Mutual Life Ins. Co. of N. Y., No. 5090777	12/30/35	*23,271.30	25,344.05
The Prudential Ins. Co. of America, No. 9114963	12/30/35	84,067.70	89,383.33
The Connecticut Mutual Life Ins. Co., No. 887777	12/30/35	20,790.73	21,126.73
Home Life Ins. Co., No. 435395	12/31/35	36,671.71	37,728.33

* Cash surrender value when right to surrender first arose, discounted to date of gift.

[fol. 43] The only question in the case is the value of the policies on the date of the transfer to the trustees. The respondent contends that the value of the policies for gift tax purposes was the cash surrender value on the date of the transfer, and points to Article 2(5) of Treasury Regulations 79, promulgated under the Revenue Act of 1932, as her authority. Article 2(5) reads as follows:

"Transfers Reached: * * * In the following examples of transactions resulting in taxable gifts * * *

"(5) The irrevocable assignment of a life insurance policy, or the naming of the beneficiary of a policy without retaining any of the legal incidents of ownership therein, constitutes a gift in the amount of the net cash surrender value, if any, plus the prepaid insurance adjusted to the date of the gift."

The Commissioner contends that Article 2(5) is invalid in view of Article 19 of the same Regulations, which reads as follows:

"Valuation of property.—(1) General.—The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. Where the property is sold within a reasonable period after the date of the gift, and it is shown that the selling price reflects the fair market value thereof as of the date of the gift, the selling price will be accepted as the amount of the gift. All relevant facts and elements of value should be considered in every case."

He argues that Article 19 deals exclusively with the valuation of property, and that any inconsistency between Article 2(5) and Article 19 must be resolved in favor of Article 19. There is an inconsistency between Article 2(5) and Article 19 of Regulations 79, and it seems inevitable that Article 2(5), which was written in under a heading "transfers reached", must give way to Article 19 which is under a heading "valuation of property", unless the word "value" as used in the Act can mean only cash surrender value, and [fol. 44] nothing else, as applied to insurance. The language of the Act does not warrant such an interpretation since it deals generally with property, and states that the value of a gift shall be considered to be the amount of the gift. Any attempt on the part of the Commissioner to promulgate a regulation which would establish a different value than that imposed by the Congress in enacting the taxing statute would be invalid. It is to be noted that when Regulations 79 were amended in 1936, Article 2(5) was amended by omitting reference to value, and by stating that the value of insurance policies was covered in Article 19(9). As will appear herein later, we reach the conclusion that insofar as Article 2(5) of Regulations 79 is applicable to single premium life insurance policies it is not consistent with the language of the Act, and would be an arbitrary and unreasonable attempt to set a valuation that is not a true one. See Lynch v. Tilden Co., 265 U. S. 315; Miller v. United States, 294 U. S. 435.

Many of the decisions that have held that the cash surrender value of an insurance policy is the true value of a gift of such a policy follow the reasoning in Commissioner v. Haines, 104 F. (2d) 854. In that case it was stated

that since Article 2(5) of Regulations 79 remained the same throughout 1934 and 1935, and received Congressional approval by the reenactment of Section 506 in the taxing statutes of 1934 and 1935, that Article 2(5) had "the force of law", citing Helvering v. R. J. Reynolds Company, 306 U. S. 110. See also Helvering v. Cronin, 106 F. (2d) 907, and Helvering v. Bryan, 109 F. (2d) 430. A close reading of the taxing statutes of 1934 and 1935 does not disclose that Section 506 of the 1932 Act was in fact reenacted in either of these years but was left unchanged.

In 1936, Article 19(9) was adopted, which reads as follows:

"(9) *Life insurance and annuity contracts.*—The value of a life insurance contract or of a contract for the payment of an annuity issued by a company regularly engaged in the selling of contracts of that character is established through [fol. 45] the sale of the particular contract by the company, or through the sale by the company of comparable contracts. As valuation through sale of comparable contracts is not readily ascertainable when the gift is of a contract which has been in force some time and on which further premium payments are to be made, the value may be approximated, unless because of the unusual nature of the contract such approximation is not reasonably close to the full value, by adding to the interpolated terminal reserve at the date of the gift the proportionate part of the gross premium last paid before the date of the gift which covers the period extending beyond that date.

"The examples given below, so far as relating to life insurance contracts, are of gifts of such contracts on which there are no accrued dividends or outstanding indebtedness.

* * * * * * *

"Example: A donor owning a life insurance policy on which no further payments are to be made to the company (e. g., a single premium policy or paid-up policy) makes a gift of the contract. The value of the gift is the amount which the company would charge for a single premium contract of the same specified amount on the life of a person of the age of the insured."

Since the application of Article 2(5) of Regulations 79 (1932 Ed.) to these policies would effect a result different than intended by Congress, we must disregard it, and it

follows that Article 19 of the 1932 Regulations as amended by Article 19(9) of the 1936 Regulations must prevail. See Manhattan Company v. Commissioner, 297 U. S. 129. It does not seem necessary, however, to turn this case entirely on the construction of any of the Regulations. Section 506 of the Revenue Act of 1932, c. 209, 47 Stat. 169, 26 U.S.C.A., § 555, is as follows:

"SEC. 506. Gifts made in property.

"If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift."

In reaching a determination of what the value means as applied to single premium policies, we must bear in mind that we are dealing with a particular type of property which may be subject to somewhat different rules than [fol. 46] would apply to most forms of property. The value of a single premium life insurance policy must mean the fair market value, if there is such a value, and, in any instance, must be based upon a consideration of all of the relevant facts and elements.

The Board below has found that the cash surrender value of a policy is an arbitrary figure arrived at by the insurer by deducting from the reserve set up under the policy a so-called surrender charge. It is for the purpose of discouraging surrender of the policy that this charge is made. We do not think that the cash surrender value of a policy on any given date is necessarily its real value within the meaning of Section 506. See Lucas v. Alexander, 279 U. S. 573. See, also, Guggenheim v. Rasquin, 110 F. (2d) 371. It is unfair to contend that the cash surrender value is the true value of a single premium life insurance policy merely because that happens to be the amount that the insurance company would give to be released from its contract. Such a contention confuses a forced liquidation for an arbitrary figure, with an assumed market in which insurance policies of this type are bought and sold.

In the strict sense of the word, insurance policies once issued and fully paid for are not bought and sold in an open market. At least, there are no published quotations of values of such policies on any given date. It would be much fairer to ask what the insurance company, which is in the business of selling insurance and not buying, would sell a similar contract for on the date of transfer where

the conditions of issuance were the same. The fallacy of the proposition that the cash surrender value is the true value of these policies can be demonstrated by recourse to one of them. In policy No. 9114410, the Board found that there was no "absolute obligation to pay the cash surrender value during the first year", but that the Prudential Life Insurance Company "would have granted the discounted value of the first year cash surrender value, as of the date of the gift". If the insurer was under no obligation to pay any cash surrender value during the first [fol. 47] year, it could be assumed that it might refuse to discount the value at the end of the first year. This would mean that the policy would have no cash surrender value as of the date of the transfer. Could it be argued successfully that the gift of this policy about a month after its issuance would be the gift of a thing having no value? We do not thing so.

A single premium insurance policy is unlike most property which is made the subject of a gift, in that it seems to have no depreciation. On the day that these policies were issued their value was the price that was paid for them. Guggenheim v. Rasquin, supra, This is demonstrated by recourse to the familiar rule for determining fair market value, namely, what a willing buyer would pay to a willing seller for an article where neither is acting under compulsion. If the value of the policies on the date of issuance was the cost, what has happened to decrease that value? To effect a decrease there must be some intervening factor or element which would have a direct relation to its value. In many types of insurance the uncertainty of the ability to pay further premiums may affect that value, but in the instant case all premiums have been paid. Nothing but the passage of time is needed to increase their value to the higher face value of the policies. Certainly there has been no decrease in the value of the policies. In other words, the value of these policies, starting out on the dates of issue, as equivalent to their cost, can only increase as time passes.

It is a well-recognized fact that the cost of insurance increases with the age of the insured. This undoubtedly is because as an insured grows older his life expectancy is shorter, and the ability of the company to earn sufficient on the reserve to pay the face of the policy at its contemplated maturity is more limited. While premiums are usually recomputed only every six months, nevertheless,

actuarial tables, it is presumed, could show an actual daily increase in the hazard. The Board below found that the reserves set up under policy No. 9114410 increased from $60,833 to $60,917.84 during the twenty-six days between [fol. 48] the date of issuance and the date of transfer of that policy. This was undoubtedly brought about either through its earnings or through reallocation of reserves. These facts are inconsistent with a decrease in the value of a single premium policy after its date of issue, and since, in our opinion, the court in Guggenheim v. Rasquin, supra, correctly held the value of a policy at the date of issue to be the cost of the policy and not its surrender value, it necessarily follows that the true value of a policy transferred shortly after the date of issue would be the cost of a similar policy on that date, and not its lower cash surrender value, which the taxpayer claims to be the proper measure of value.

We therefore reject the theory that the cash surrender value of the policies, or even the reserves of the policies, was the test of their value on the date of transfer, and think that the Commissioner assessed the tax on the minimum proper basis, namely, the cost of the policies to the donor.

The decision of the Board of Tax Appeals is reversed, and the case is remanded to the Board for further proceedings not inconsistent with this opinion.

Magruder, J., concurring. The statute does not define "value", but merely provides that if the gift is made in property "the value thereof at the date of the gift shall be considered the amount of the gift". It is not clear to me that the cash surrender value test stated in Article 2(5) of Regulations 79 (1932 ed.) is invalid as in conflict with the statute. Nor is it clear to me that the specific provision in Article 2(5) (1932 ed.) dealing with this particular species of property is inconsistent with the general provisions of Article 19(1) of the same edition of the Regulations. But the provisions of the 1932 edition of the Regutions, as applied to gifts of insurance policies, were at best unclear and confusing (see Guggenheim v. Rasquin, 110 F. (2d) 371, 373), and the Commissioner quite properly clarified the Regulations in the 1936 edition. The Commis- [fol. 49] sioner's regulations are merely persuasive guides for the courts in interpreting the revenue acts and, at least in the absence of an intervening reenactment by Congress

(Helvering v. Reynolds Co., 306 U. S. 110, 116), the courts are free to adopt and apply retroactively a later regulation clarifying and modifying an earlier interpretation. In this case the regulation as amended in 1936 certainly gives a permissible interpretation of the act. Indeed, having in view the peculiar nature of single premium life insurance policies as "property", I think the later interpretation is the more reasonable one, as the opinion of the court demonstrates.

On the same date, to-wit, July 16, 1940, the following Final Decree was entered:

FINAL DECREE—July 16, 1940.

This cause came on to be heard April 17, 1940, upon the record on petition for review of the United States Board of Tax Appeals, and was argued by counsel.

Upon consideration whereof, It is now, to-wit, July 16, 1940, here ordered, adjudged and decreed as follows: The decision of the Board of Tax Appeals is reversed, and the case is remanded to the Board for further proceedings not inconsistent with the opinion passed down this day.

By the Court.

Arthur I. Charron, Clerk.

Thereafter, to-wit, on July 31, 1940, on motion, mandate was stayed until further order of court.

[fol. 50] CLERK'S CERTIFICATE

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing pages numbered 1 to 49, inclusive, contain and are a true copy of the record and all proceedings to and including September 23, 1940, in the cause in said court numbered and entitled, No. 3546, Commissioner of Internal Revenue, Petitioner for Review, v. Madeleine D. Powers.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twenty-third day of September, A. D. 1940.

Arthur I. Charron, Clerk. (Seal United States Circuit Court of Appeals, First Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 12, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, and the case is assigned for argument immediately following No. 92.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1676)

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 486

MADELEINE D. POWERS,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit and Brief in Support

RALPH G. BOYD,
Attorney for Petitioner.

PRESS OF GEO. H. DEAN CO., BOSTON

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No.

MADELEINE D. POWERS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

To the Honorable The Chief Justice and The Associate Justices of the Supreme Court of the United States:—

The petitioner, Madeleine D. Powers, respectfully petitions this Court to require by certiorari to the United States Circuit Court of Appeals for the First Circuit that it certify to this Court for review and determination the cause wherein said Circuit Court of Appeals on July 16, 1940 entered its final decree reversing the decision of the United States Board of Tax Appeals holding that there was no deficiency in the petitioner's gift tax for 1935 and remanding the case to said Board for further proceedings not inconsistent with the opinion passed down by said Circuit Court of Appeals on said day.

OPINIONS BELOW

The memorandum findings of fact and opinion of the United States Board of Tax Appeals entered January 9, 1939 is not reported but appears at R. 15-19. The opinion of the Circuit Court of Appeals and concurring opinion entered July 16, 1940 are not yet officially reported but appear at R. 41-48.

STATEMENT OF MATTER INVOLVED

This cause involves an alleged deficiency in the petitioner's gift tax for 1935.

In late November and early December, 1935, the petitioner purchased six single premium policies of life insurance, three ordinary life policies on her own life and three ten-year endowment policies on the life of a daughter. (R. 16.) On December 30 and 31, 1935, the petitioner, who had retained the right to change the beneficiaries of the policies in which she was named insured and who was entitled to the proceeds of the other policies if living at the time the proceeds became payable, made gifts of the policies in the form of irrevocable assignments to her husband and the Massachusetts Hospital Life Insurance Co., as trustees. (R. 17.)

In her gift tax return for the year 1935 the petitioner computed the total value of the policies as $233,360.30, which was the cash surrender value of the policies on the date of the gift, and a tax was paid on that basis. (R. 19.) This the petitioner believed was in accordance with the regulation then in effect, Art. 2 (5) of Treasury Regulations 79, as approved October 30, 1933, which provided as follows:

> "(5) The irrevocable assignment of a life insurance policy, of the naming of the beneficiary of a policy without retaining any of the legal incidents of ownership therein, constitutes a gift in the amount of the net

cash surrender value, if any, plus the prepaid insurance adjusted to the date of the gift."

On February 26, 1936 a new edition of Treasury Regulations 79 was approved which provided in Art. 19 (9) that where a donor, owning a life insurance policy on which no further payments are to be made to the company, for example, a single premium policy, makes a gift of the contract, the value of the gift is the amount which the company would charge for a single premium contract of the same specified amount on the life of a person of the age of the insured. Following this, the respondent Commissioner of Internal Revenue under date of November 30, 1936 mailed petitioner notice of a deficiency of $4,134.52. (R. 5.) This was based upon a valuation of $273,149.58 (R. 19), which was the total amount originally paid by the petitioner for the policies, her age in years being the same on the date of the gift as on the date the policies were issued.

On February 26, 1937 petitioner filed with the United States Board of Tax Appeals a petition for redetermination of the alleged deficiency (R. 1, 3), hearing was had (R. 2), and on January 9, 1939 the Board of Tax Appeals, adhering to its conclusion reached in *Ernest A. Cronin*, 37 B.T.A. 914 (1938), and *Mary H. Haines*, 37 B.T.A. 1013 (1938), made a finding of fact that the total value of the gifts when made was $233,360.30 and entered its decision that there was no deficiency in the petitioner's gift tax for 1935. (R. 19.)

On March 29, 1939 respondent Commissioner petitioned the United States Circuit Court of Appeals for review of the decision by the Board of Tax Appeals. (R. 20.) The cause was heard by said Court on April 17, 1940, the Honorable Calvert Magruder and the Honorable John C. Mahoney, Circuit Judges, and the Honorable George C. Sweeney, District Judge, sitting, and on July 16, 1940 it handed down an opinion, per Sweeney, J. (R. 41-47), and a concurring

opinion, per Magruder, J. (R. 47-48), reversing the decision of the Board of Tax Appeals and remanding the case to the Board for further proceedings not inconsistent with the opinion of said Court. The opinion of said Court concluded as follows (R. 47):

> "We therefore reject the theory that the cash surrender value of the policies, or even the reserves of the policies, was the test of their value on the date of transfer, and think that the Commissioner assessed the tax on the minimum proper basis, namely, the cost of the polices to the donor."

It is the foregoing decision of said Circuit Court of Appeals which the petitioner seeks to have reviewed.

JURISDICTION

The final decree of the Circuit Court of Appeals was entered July 16, 1940 and mandate was stayed on July 31, 1940 until further order of said Court. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, 28 U. S. Code §347a, as amended by the Act of February 13, 1925.

STATUTE INVOLVED

The statute involved is Section 506 of the Gift Tax Act of 1932 (47 Stat. 248) which provides as follows:

> "If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift."

QUESTIONS PRESENTED

There is no dispute that the petitioner made gifts of the six single premium life insurance policies in 1935 or that they were subject to a gift tax. The only questions are:

1. What was the value of the policies at the date of the gifts for purposes of Section 506 of the Gift Tax Act of 1932 (47 Stat. 248); and

2. Was determination of the value of the policies a question of fact to be determined from all the attendant circumstances, and if so, could the Circuit Court of Appeals in effect substitute its judgment concerning such fact for that of the Board of Tax Appeals by reversing the Board's decision and remanding the case to the Board for further proceedings not inconsistent with said Court's opinion?

REASONS WHY THE WRIT OF CERTIORARI SHOULD ISSUE

The decision by the Circuit Court of Appeals for the First Circuit in this case as to the value of life insurance policies for gift tax purposes is in conflict with the decisions of the Circuit Court of Appeals for the Third Circuit (*Commissioner* v. *Haines,* 104 F. (2d) 854), the Fourth Circuit (*Helvering* v. *Bryan,* 109 F. (2d) 430), the Seventh Circuit (*Ryerson* v. *United States,* Nos. 7133 and 7134, October Term, 1939, decided July 9, 1940) and the Eighth Circuit (*Helvering* v. *Cronin,* 106 F. (2d) 907). It is in accord with the decision of the Circuit Court of Appeals for the Second Circuit in *Guggenheim* v. *Rasquin* (110 F. (2d) 371), now pending before this Court upon petition for writ of certiorari, October Term, 1939, No. 1030, October Term, 1940, No. 92. Other cases are pending awaiting settlement of this conflict. It is of major importance both from the standpoint of administering the Gift Tax Act and from the standpoint of the general public which invests in life insurance that this question should be settled.

The decision of the Circuit Court of Appeals in this case is also probably in conflict with the applicable decisions of this Court as to whether the determination of such value is a question of fact to be determined from all the attendant circumstances. Compare *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U.S. 37, 40 (1937); *The Minnesota Rate Cases,* 230 U.S. 352, 434 (1912). On that basis it departs

from the accepted and usual course of judicial review of decisions by administrative agencies in a manner warranting the exercise of this Court's power of supervision.

These questions, as presented in this case, are important not alone in regard to the valuation of life insurance policies; they also have an important bearing upon the whole field of valuation for estate and gift tax purposes. Compare *Helvering* v. *Safe Deposit & Trust Co. of Baltimore*, 95 F. (2d) 806, 811, 812 (C.C.A. 4th, 1938); *Commissioner* v. *Shattuck*, 97 F. (2d) 790, 792 (C.C.A. 7th, 1938).

PRAYER

For the foregoing reasons, your petitioner prays that a writ of certiorari issue out of this Court to the United States Circuit Court of Appeals for the First Circuit, commanding said Court to certify and send to this Court on a day to be determined a full and complete transcript of the record of all the proceedings of such Circuit Court of Appeals had in this case, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that petitioner be granted such other and further relief as may be proper.

MADELEINE D. POWERS

By RALPH G BOYD,
Her Attorney.

Boston, Massachusetts
October, 1940.

Brief in Support of Petition for Certiorari

The question of determining the value of life insurance policies for gift tax purposes is also presented by *Guggenheim* v. *Rasquin*, 110 F. (2d) 371 (C.C.A. 2nd), now pending before this Court on petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit, October Term, 1939, No. 1030, October Term, 1940, No. 92. In that case all of the policies were single premium policies which were assigned either at the time of taking them out or prior to formal issuance. It is not stated in the opinion of the Circuit Court of Appeals for the Second Circuit (110 F. (2d) 371) whether the policies were in the form of ordinary life policies or endowment policies. In the instant case a substantial period elapsed between the date when the policies were issued and the date of the irrevocable assignment and all six of the policies were single premium policies but three were ordinary life policies and three were ten-year endowment policies. The Solicitor General has filed a memorandum on behalf of the respondent in *Guggenheim* v. *Rasquin, supra*, stating that he does not oppose the granting of a writ of certiorari in that case in view of the conflict with *Commissioner* v. *Haines*, 104 F. (2d) 854 (C.C.A. 3d), *Helvering* v. *Cronin*, 106 F. (2d) 907 (C.C.A. 8th), and *Helvering* v. *Bryan*, 109 F. (2d) 430 (C.C.A. 4th), the fact that the same question is involved in other cases now pending, and the further fact that it is important from an administrative standpoint that the question be settled. The instant case is also in conflict with the cases above referred to and—with *Guggenheim* v. *Rasquin*—is now also in conflict with a fourth case, *Ryerson* v. *United States*, Nos. 7133 and 7134, October Term, 1939, decided by the Circuit Court of Appeals for the Seventh Circuit on July 9, 1940, but not yet officially reported. The types of policies here involved and the circumstances of this case, especially when they are compared with the policies and circumstances involved in *Guggenheim* v. *Rasquin* and the conflicting cases

above referred to, make it of first importance both from an administrative standpoint and from the standpoint of the general public, that this case be reviewed and determined as well as the *Guggenheim* case.

There is more to the instant case, however, than the single question what is the value of certain single premium life insurance policies for purposes of the gift tax. The instant case also raises an important question as to whether determination of the value of life insurance policies for gift tax purposes is a question of fact, and if so, whether the Circuit Court of Appeals can, by reversing the Board of Tax Appeals' decision and remanding the case to the Board for further proceedings not inconsistent with its opinion, in effect substitute its judgment concerning such fact for that of the Board. The Board of Tax Appeals, in line with *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U.S. 37 (1937), considered its determination of value to be one of fact. (R. 19, and see *Ernest A. Cronin,* 37 B.T.A. 914, 920 (1938)), but the Circuit Court of Appeals disregarded this consideration and by its final decree effectively limited the Board to a determination in accordance with the judgment of value of the Circuit Court of Appeals. This it is submitted is probably in conflict with the applicable decisions of this Court (see *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U.S. 37, 40 (1937)) and, on that basis, departs from the accepted and usual course of judicial review of decisions by administrative agencies to such an extent as to warrant an exercise of this Court's power of supervision.

While this second question is a separate and important question in the instant case, the two cases, *Guggenheim* v. *Rasquin* and the instant case, might conveniently be heard and determined together.

Respectfully submitted,

RALPH G BOYD
Attorney for Petitioner.

Boston, Massachusetts,
October, 1940.

In the
Supreme Court of the United States

OCTOBER TERM, 1940

No. 486

MADELEINE D. POWERS, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit

---

BRIEF FOR THE PETITIONER

RALPH G. BOYD,
Attorney for the Petitioner

ROBERT VANCE BROWN,
Of Counsel on the Brief

PRESS OF GEO. H. DEAN CO., BOSTON

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals and concurring opinion are not yet officially reported but appear at R. 41-48. The memorandum findings of fact and opinion of the United States Board of Tax Appeals is not reported but appears at R. 15-19.

JURISDICTION

The final decree of the Circuit Court of Appeals was entered July 16, 1940. (R. 48.) A petition for writ of certiorari was filed October 7, 1940 and was

granted November 12, 1940. (R. 49.) This court's jurisdiction rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE

The case involves an asserted deficiency in the petitioner's gift tax for 1935. In her return the petitioner gave as the value of gifts of single premium life insurance policies the amount of their cash surrender value on the dates of the gifts. The Commissioner of Internal Revenue claimed that the correct value was the cost of duplicating the policies at the dates of the gifts, and asserted a deficiency of $4,134.52. (R. 5.)

STATUTE AND REGULATIONS INVOLVED

The statute involved is Section 506 of the Gift Tax Act of 1932, 47 Stat. 248, which provides as follows:

> "If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift."

The pertinent regulations are set forth in the Appendix, *infra,* pages 56-62.

FACTS FOUND BY THE BOARD OF TAX APPEALS

The Board of Tax Appeals held a hearing on the merits at which a stipulation of facts (R. 11-15) was filed and oral testimony, later set forth in an agreed statement of evidence (R. 25-38), was given. The facts as found by the Board of Tax Appeals (R. 16-19) may be summarized as follows:

During November and December of 1935 the petitioner, Madeleine D. Powers, purchased six single premium policies of insurance, as follows (R. 16):

Company and policy number	Date of issue of policy	Name of insured	Face amount of policy	Amount of single premium paid	Type of policy
The Fidelity Mutual Life Ins. Co., No. 532838	11/25/35	Madeleine D. Powers	$20,000	$13,967.40	Ordinary Life
The Prudential Ins. Co. of America, No. 9114410	12/4/35	Madeleine D. Powers	100,000	68,779.00	Ordinary Life
The Mutual Life Ins. Co. of N. Y., No. 5090777	11/25/35	Madeleine D. Powers	40,000	27,204.80	Ordinary Life
The Prudential Ins. Co. of America, No. 9114963	12/5/35	Madeleine Powers	122,000	99,672.78	10-Yr. Endowment
The Connecticut Mutual Life Ins. Co., No. 887777	11/27/35	Madeleine Powers	28,000	22,671.60	10-Yr. Endowment
Home Life Ins. Co. No. 435395	11/27/35	Madeleine Powers	50,000	40,854.00	10-Yr. Endowment

The policies in which the petitioner, Madeleine D. Powers, was named as the insured were payable at the outset to the petitioner's husband, George H. Powers, if living. The policies in which the petitioner's daughter, Madeleine Powers, was named as the insured were payable to the petitioner if living, otherwise to the insured, the estate of the insured or the estate of the petitioner. (R. 17.) All of the policies were in such form that they could be readily assigned whether or not the assignee might have an insurable interest. (R. 18.)

On December 30 and 31, 1935 the petitioner made gifts of the policies in the form of irrevocable assignments to the petitioner's husband and the Massachusetts Hospital Life Insurance Co. as Trustees. (R. 17.)

During the period which elapsed between the date of issuance and the date of assignment of the policies there was not a sufficient change in the age of the insured to require the payment of larger single premiums than those paid by the petitioner for the issuance of the policies. (R. 17.)

At the time of the respective gifts the policies had cash surrender values and reserves carried against them as follows (R. 16-17):

Company and policy number	Date of gift	Cash surrender value on date of gift	Reserve carried by Ins. Co. at date of gift
The Fidelity Mutual Life Ins. Co., No. 532838	12/30/35	$12,360.00	$12,672.02
The Prudential Ins. Co. of America, No. 9114410	12/30/35	56,198.86	60,917.84
The Mutual Life Ins. Co. of N. Y., No. 5090777	12/30/35	* 23,271.30	25,344.06
The Prudential Ins. Co. of America, No. 9114963	12/30/35	84,067.70	89,383.33
The Connecticut Mutual Life Ins. Co., No. 887777	12/30/35	20,790.73	21,126.73
Home Life Ins. Co., No. 435395	12/31/35	36,671.71	37,728.33

*Cash surrender value when right to surrender first arose, discounted to date of gift.

There were no accumulated dividends apportioned or credited to any of the policies, provisionally or otherwise, and no paid-up additions to the policies. (R. 17.) In calculating the reserve as above set forth the companies used the American Experience Table of Mortality with 3% or 3½% interest. (R. 17.) None of the companies in this case would have paid to the owner of the policy on the date of the gift the amount of the reserve against the policy. (R. 18.)

In the case of a single premium policy the cash surrender value during the first year in which the policy is outstanding is always less than the reserve. The cash surrender value is the reserve for the policy

less a surrender charge, and varies with the different companies and policy years. The surrender charge and premiums actually paid in the particular year account for the difference between the reserve and the cash surrender value on a particular policy. The discouragement of surrenders is one of the reasons for the surrender charge. Part of the surrender charge is placed in a contingency reserve to meet adverse mortality and interest expense over a period of years. (R. 17-18.)

The premium exceeds the reserve at the outset by the amount of expenses which include commissions, taxes, medical fees, cost of issuing the policy and placing it on the books, and the inspection fee. (R. 18.)

Banks and insurance companies make loans on insurance policies, the latter generally charging a higher rate of interest. To insurance companies the loan value of a policy is equal to its cash surrender value, except that some companies deduct the interest charge from the loan at the start. A bank will generally loan up to 90% of the cash surrender value, and in some cases up to the full cash surrender value where the policy is the only collateral. (R. 18-19.)

Individuals frequently buy insurance policies for investment, but corporations do not. (R. 19.)

With respect to Prudential Policy No. 9114410, interpolating between the initial reserve of $60,833 for $100,000 of insurance at the age of fifty-seven and $62,024, the terminal reserve, at the age of fifty-eight, the total interpolated reserve as of December 30, 1935, twenty-six days after the issuance of the policy, was $60,917.84. The single premium charged at the

outset, $68,779, included the amount necessary to maintain the company's reserves, plus all costs of management and commissions, commonly called loading charges. The Prudential Insurance Company of America, not having an absolute obligation to pay the cash surrender value during the first year, would have granted the discounted value of the first year cash surrender value, as of the date of the gift. Discounting the cash surrender value at 3½ per cent, the amount of the gift in the case of Prudential Policy No. 9114410 would be $56,076.94. (R. 18.)

On March 11, 1936 the petitioner filed with the Collector of Internal Revenue at Boston, Massachusetts, a gift tax return for the calendar year 1935 in which the gifts were valued at $233,360.30, that sum representing the cash surrender value of the policies on the respective dates of gift. The Commissioner increased the value to $273,149.58 by using the total amount of the single premiums paid by the taxpayer. (R. 19.)

"The total value of the gifts when made in 1935 was $233,360.30." (R. 19.)

Decisions Below

On the foregoing facts the Board of Tax Appeals saw no reason for arriving at a different conclusion than that reached in *Ernest A. Cronin,* 37 B. T. A. 914 (1938), and *Mary H. Haines,* 37 B. T. A. 1013 (1938) and a decision was entered ordering and deciding that there was no deficiency in the petitioner's gift tax for 1935. (R. 19.)

This decision was reversed by the Circuit Court of Appeals for the First Circuit on the Commissioner's

petition for review and the case was remanded to the Board of Tax Appeals for further proceedings not inconsistent with the opinion of the court. (R. 48.) The ruling of the opinion is indicated by the concluding sentence, per Sweeney, J. (R. 47):

> "We therefore reject the theory that the cash surrender value of the policies, or even the reserves of the policies, was the test of their value on the date of transfer, and think that the Commissioner assessed the tax on the minimum proper basis, namely, the cost of the policies to the donor."

QUESTIONS PRESENTED

There is no dispute that the petitioner made gifts of the six single premium life insurance policies in 1935 or that they were subject to a gift tax. The only questions are:

1. What was the value of the policies at the date of the gifts for purposes of Section 506 of the Gift Tax Act of 1932, 47 Stat. 248; and

2. Was determination of the value of the policies a question of fact to be determined from all the attendant circumstances, and if so, could the Circuit Court of Appeals in effect substitute its judgment concerning such fact for that of the Board of Tax Appeals by reversing the Board's decision and remanding the case to the Board for further proceedings not inconsistent with the court's opinion?

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In holding that the *minimum* proper basis for measuring the value of the single premium life insurance policies for gift tax purposes was the cost of the policies to the donor.

2. In reversing the decision of the Board of Tax Appeals and remanding the case to the Board for further proceedings that were in effect limited to finding "as a fact" that the value of the policies for gift tax purposes was the cost of the policies to the donor.

SUMMARY OF ARGUMENT

The petitioner maintains that the standard of value to be applied under the gift tax statute is fair market value, and not value to the owner, and that the determination in this case should therefore exclude from consideration those advantages conferred by the property which are important only to the particular owner. (Point I.) The question of value under the statute is a question to be determined from a consideration of all relevant facts and the Commissioner of Internal Revenue has no power, therefore, to promulgate a regulation excluding from consideration all relevant factors except the single factor of the cost of replacement. (Point II.) These principles were correctly applied by the Board of Tax Appeals in this case and its finding of value is not only supported by substantial evidence, but tested by the standard of value to be applied under the statute, is actually the most reasonable conclusion that could have been

reached. The decision was therefore in accordance with law and the Circuit Court of Appeals was without power to modify or reverse it. (Point III.) For these reasons, it was error for the Circuit Court of Appeals to reverse the Board's decision and remand the case for further proceedings not inconsistent with the court's opinion. The court's final decree so deciding should be reversed and the decision of the Board of Tax Appeals affirmed.

ARGUMENT

I.

SINCE THE STANDARD TO BE APPLIED IN DETERMINING THE VALUE OF PROPERTY FOR GIFT TAX PURPOSES IS FAIR MARKET VALUE, AND NOT VALUE TO THE OWNER, THE DETERMINATION SHOULD EXCLUDE FROM CONSIDERATION THOSE ADVANTAGES CONFERRED BY THE PROPERTY WHICH ARE IMPORTANT ONLY TO THE PARTICULAR OWNER.

Section 506 of the Gift Tax Act of 1932, 47 Stat. 248, the only statutory provision here involved, provides that "If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift." This establishes "value" as the standard or criterion for determining the amount of a gift of property, but the statute does not define the word "value" and until its meaning has been made clear it is useless to attempt to apply it as a standard.

The word "value" alone may mean (1) the value of property to its owner, (2) the market value, defined as the amount for which the owner could sell

it, or a variation of either of these. See I Bonbright, *Valuation of Property* (1937) Part I. The first emphasizes the peculiar advantages that the property may be capable of conferring upon the particular owner, whereas the second takes into account only those advantages conferred by the property which bear upon an exchange in the market. A portrait, for example, may be worth a great deal to the owner who believes it is a likeness of his ancestor, but otherwise it may be of such little artistic merit and interest that it would command very little in a market of portrait dealers. Similarly, 100 shares of stock in a corporation may bring a low bid on the stock exchange and yet be worth a great deal more than that to the man who without those shares would lose control of the corporation. The amount in dollars that is said to be the "value" of a thing will vary widely, therefore, according to whether it is value to a particular owner or value in the market that is in question.

The language of the Gift Tax Act of 1932 offers very little help in determining how the word "value" is used in that statute. The fact, however, that it is the word *as it appears in a tax statute* that is to be construed is in itself of considerable significance, for the generally accepted meaning of "value" as used in tax statutes has been exchange or market value, and not value to the particular owner. *Ithaca Trust Co.* v. *United States*, 279 U.S. 151, 155 (1929); *Commissioner* v. *Worcester County Trust Co.*, Mass. Adv. Sh. (1940) 543, 544; accord, *Schley* v. *Montgomery County Com'rs*, 106 Md. 407, 410 (1907); *Massachusetts General Hospital* v. *Belmont*, 233 Mass. 190, 207 (1919); *National Bank of Commerce* v. *New Bed-*

ford, 155 Mass. 313, 315 (1892); *People ex rel Sebring* v. *Dowd,* 206 App. Div. 727, 728 (4th Dep't, 1923). It is to be presumed, therefore, that when Congress used the word "value" in the gift tax statute it had the commonly accepted meaning for tax statutes in mind.

The market value meaning, moreover, is established as the correct meaning for purposes of the estate tax, where precisely the same problem was presented. Section 202 of the Revenue Act of 1916, 39 Stat. 777, provided that "the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. . . ." and this language was reenacted without change in the Revenue Act of 1918, §402, 40 Stat. 1097, the Revenue Act of 1921, §402, 42 Stat. 278, the Revenue Act of 1924, §302, 43 Stat. 304, and the Revenue Act of 1926, §302, 44 Stat. 70. The same language was used in the Revenue Act of 1934, §404, 48 Stat. 754, but in that statute the provision was amended by adding the words "except real property situated outside the United States." Here then was exactly the same problem as exists with respect to the gift tax statute. The single word "value" was used. There was no definition of it in the statute and no other provision from which a clear inference could be drawn. Yet in *Ithaca Trust Co.* v. *United States,* 279 U.S. 151 (1929), a case involving the determination of the "value" for estate tax purposes of a life interest under a testamentary trust, this Court clearly sanctioned market value as the correct meaning. Indeed it would be difficult to find a better definition of market value than that which Mr.

Justice Holmes, speaking for a unanimous Court, used in that case:

> "The value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money that it would bring in the market." (279 U.S. at 155.)

It is in this sense that "the word is used by the law." (279 U. S. at 155.)

By now, any doubt that might have existed as to whether market value was the correct meaning for "value" as it is used in the estate tax statutes must certainly be dissipated by the repeated reenactments of the same provision in the light of treasury regulations which clearly adopt market value, as distinguished from value to the owner, as the proper meaning. The first regulation with respect to value, Article 14 of Regulations 37 promulgated in 1919, provided explicitly that "The value to be ascertained is the market, or sale, value of the property." This provision was retained when Regulations 37 were revised in 1921 and was adopted again in Article 13 of Regulations 63 promulgated in 1922. Thereafter there was no change until Regulations 70 promulgated in 1926 provided in Article 13 that "The value of all property includable in the gross estate is the fair market value thereof at the time of the decedent's death" and this wording has continued to the present time. The regulations, therefore, have consistently adopted market value as the correct meaning for purposes of the estate tax. And four times during the period of these regulations the single word "value" has been reenacted by Congress without change—in the Revenue Act of 1921, §402, the

Revenue Act of 1924, §302, the Revenue Act of 1926, §302 and the Revenue Act of 1934, §404. Certainly if ever there was a proper case for application of the doctrine of *Helvering* v. *R. J. Reynolds Tobacco Co.,* 306 U.S. 110 (1939) this is one. Indeed here the inference is even stronger. The fact that Congress in §404 of the Revenue Act of 1934, 48 Stat. 754, amended the very section in question, §302 of the Revenue Act of 1926, by adding the words "except real property situated outside the United States", shows that the attention of Congress was especially drawn to that section. Under those circumstances, the failure of Congress to make any change in the language as to "value" is especially persuasive that it approved of the meaning adopted by the regulations. Certainly by now there can be no question but that the market value meaning of "value" has acquired the force of law for purposes of the estate tax.

This fact, it need hardly be pointed out, is persuasive authority in considering the same problem with respect to the gift tax statute. The same word is used in the same way in similar statutes. When there is added to this, however, the further fact that the gift tax was adopted to supplement the estate tax and that the two are in *pari materia* and should therefore be construed together, *Estate of Sanford* v. *Commissioner,* 308 U.S. 39, 44 (1939), the construction put upon the word for purposes of the estate tax should be *conclusive* in answering the same question for purposes of the gift tax.

That this is true is recognized in the gift tax regulations themselves. Both the 1933 and 1936 editions

of Article 19 of Regulations 79 refrain from expressly stating that the meaning of value for purposes of the gift tax is market value, but it is a clear inference from each that this is so. Each adopts the formula of "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell", and that, it will be seen, is essentially an exchange or market value concept. The 1933 edition then provides that "Where the property is sold within a reasonable period after the date of the gift, and it is shown that the selling price reflects the fair market value thereof as of the date of the gift, the selling price will be accepted as the amount of the gift." In place of this the 1936 edition provides that "Such value [i.e. the value of the property] is to be determined by ascertaining as a basis the fair market value at the date of the gift of each unit of the property." It is clear, therefore, that under the gift tax regulations themselves market value is the proper meaning of value for purposes of the gift tax.

There is then abundant and persuasive support for the conclusion that the standard to be applied in determining value for purposes of the gift tax is fair market value, and not value to the particular owner.

It is hardly necessary to point out, however, that the problem of definition does not stop here. The standard of market or exchange value is readily applied to many articles of property. The food we eat, the clothes we wear, our household furnishings, our stocks and bonds are regularly sold in established markets. They are sold both new and "second-hand". There is a "fair market" to which easy reference can

be made for the price at which such property changed hands between a willing buyer and a willing seller on the day in question. In fact the ease with which the market value standard can be applied in so many cases has probably been responsible in large degree for its adoption by the legislators and the courts in preference to value to the owner or variations of that meaning, the practical determination of which is beset by many difficulties. The problem of proving the value of an ancestral portrait handed down from generation to generation, for example, would exhaust the patience and time of those charged with the administration of the tax statutes if its special value to the owner because it was an ancestor's portrait had to be determined. But while the market value standard is better for purposes of practical administration than any other standard, even it does not reach all cases. There may never have been an actual market for the property to be valued or if the property had been sold at some time during its history the exchange may have taken place at the wrong time, i.e. at a time other than the time as of which the exchange or market value is to be determined. Where this situation exists the law requires that an attempt be made to determine as nearly as possible what the market price would be if there actually were a market. *Commissioner* v. *Worcester County Trust Co.*, Mass. Adv. Sh. (1940) 543, 545; cf. *Sinclair Rfg. Co.* v. *Jenkins Co.*, 289 U.S. 689, 697 (1933).

That this rule is recognized by the Commissioner as applicable in many situations under the gift tax statute is apparent from the regulations. Article 19 (1) of Regulations 79 (1936 edition) provides that the value of property which is the subject of a gift "is the

price at which such property *would* change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. * * * Such value is to be determined by ascertaining as a basis the fair market value at the time of the gift * * * All relevant facts and elements of value as of the time of the gift should be considered." (Italics supplied.) If there were an actual market for all property covered by the statute the subjunctive tense used in the expression of the willing buyer—willing seller formula and the reference to the need to consider all relevant facts would not be necessary. Instead it would be sufficient to say that the value of the property is what it or comparable units of property actually sold for on the day of the gift.

But the fact that there is no actual market for some types of property and that in those cases a hypothetical market must be postulated does not mean that the standard of value is still not market or fair market value instead of value to the owner or a variation of the latter meaning. The fact that the type of property in question is "peculiar" in the sense that it is not sold in an actual market does not justify the application of a standard different from that which clearly exists for property for which there is an admitted actual market. The statute applies to "property"—which means "all property", not just some types of property. The language does not warrant a dual standard and in equity and fairness there should be none. The property dealt with in *Ithaca Trust Co.* v. *United States,* 279 U.S. 151 (1929), a life interest under a testamentary trust with authority in the life tenant to use from the principal any sum "that may be necessary to suitably maintain her in as much com-

fort as she now enjoys" (279 U.S. at 154), was as much dependent upon uncertainties and as lacking for want of an actual buyer as any insurance policy might be, yet as we have seen no thought appears in the opinion that any but the standard of market value was applicable in determining the value of the property. In theory, therefore, and on authority, the standard to be applied to all types of property, whether they are marketable or not, is fair market value and not value to the particular owner. *Commissioner* v. *Worcester County Trust Co.,* Mass. Adv. Sh. (1940) 543, 545.

The expression in the estate and gift tax regulations is "fair market value", but it is to be doubted whether the adjective "fair" adds any meaning or connotation to "market value" that would not be held to exist without it. If a seller is forced to take from a buyer aware of his need for an immediate sale a price different from that which he could obtain if an immediate sale were of equal insignificance to both, it is clearly the latter price which the statute intends as a standard. The statutory requirement that value be determined *as of a particular time* is not meant to suggest that *time* itself shall be of any importance in the market which is the standard, and though time may make the money in place of the property of such *special* advantage to the seller that for him all ordinary advantages conferred by the property are subordinate to it, it is in accordance with the law that in determining the value of the property such *special* advantage to the seller should be excluded from consideration. Cf. *Massachusetts General Hospital* v. *Belmont,* 233 Mass. 190, 209 (1919). The regulations rightly provide that in assuming a hypothetical market neither the buyer nor the seller must be under

any compulsion to buy or to sell. Treasury Regulations 79, Art. 19 (1).

It is by the same token, however, that in assuming a hypothetical market those advantages conferred by the property which are important only to the particular owner should be excluded from consideration. A given piece of property, for example the portrait of the owner's ancestor or the 100 shares of stock without which the owner would lose control of the corporation, may confer advantages upon the particular owner which the same property would not be capable of conferring upon another owner. The dealer in the actual market, though he bargains for and acquires the *entire* "bundle of rights" making up the property, will take into consideration in setting his price only those advantages conferred by the property which are capable of being enjoyed by himself and others in the market. The fact that the portrait is a likeness of an ancestor or that the stock is the difference between control or loss of control may mean a great deal to the particular owner but to the dealer and to others incapable of enjoying like advantages from the property they are of little importance and consequently have little or no effect upon the market. It is therefore reasonable and fair when it becomes necessary to postulate a hypothetical market for unmarketable property that the law should exclude from consideration those special and unique advantages conferred by the property which are of importance only to the particular owner. They are irrelevant in the actual market and, the standards being the same, they are equally irrelevant in postulating a hypothetical market. As the court pointed out in *Massachusetts General Hospital* v. *Belmont,* 233 Mass. 190 (1919), a

case requiring the assumption of a hypothetical market for a hospital, the consideration must not go "beyond a point where there would have been competition among probable buyers into the region of value to the petitioner [owner] alone." (233 Mass. at 209.) And cf. *New York* v. *Sage,* 239 U.S. 57, 61 (1915).

It is submitted, therefore, that in determining the value of life insurance policies or of any other property for purposes of the gift tax the standard to be applied is market or fair market value, and not value to the particular owner, and that for that reason the determination should exclude from consideration those advantages conferred by the property which are important only to the particular owner.

II.

THE COMMISSIONER IS WITHOUT POWER TO PROMULGATE A REGULATION MAKING THAT, WHICH UNDER THE STATUTE IS A QUESTION TO BE DETERMINED FROM A CONSIDERATION OF ALL RELEVANT FACTS, A MATTER DEPENDENT UPON THE SINGLE FACTOR OF REPLACEMENT COST ALONE.

The gift tax statute does not say in so many words that the value of a given piece of property is a "question of fact" to be determined upon a consideration of all relevant facts and circumstances. Section 506 of the statute, 47 Stat. 248, merely provides that "If the gift is made in property, *the value thereof* at the date of the gift *shall be considered* the amount of the gift." (Italics supplied.) This clearly prescribes a statutory rule of law for determining the amount of

the gift for purposes of the tax. A particular thing, i.e. the value of the property, is made to determine in all instances the base by which the tax shall be measured. But beyond this the statute does not go. Whether *in truth* the determination of that particular thing is a question of fact or a question of law, the statute does not say.

It is not necessary for our purposes, however, to go further and decide whether in truth the phenomenon which the statute calls "value" is a concrete, actual occurrence or an abstract rule or legal principle. That philosophical problem may be left to the philosophers. It is enough here that the law in general treats "value" as a concrete occurrence to be established as a fact and that the manner in which it is used in §506 clearly manifests an intention to adopt the same treatment for purposes of the gift tax. Cf. I Wigmore, *Evidence* (3rd ed. 1940) §1 at p. 2. The law has universally dealt with the "value" of property as a fact to be found under appropriate rules of law, whatever the sense in which the word is used. *The Minnesota Rate Cases,* 230 U.S. 352, 434 (1912) (value for purposes of determining whether rates were confiscatory); *Standard Oil Co.* v. *So. Pacific Co.,* 268 U.S. 146, 156 (1925) (compensation for loss of ship); *Rowley* v. *Chicago & N. W. Ry.,* 293 U.S. 102, 109 (1934) (actual value for purposes of property tax); *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U.S. 37, 40 (1937) (fair market value for purposes of measuring gain under income tax); *Helvering* v. *Safe Deposit & Trust Co. of Baltimore,* 95 F. (2d) 806 (C. C. A. 4th, 1938) (value for purposes of estate tax); *Massachusetts General Hospital* v. *Belmont,* 233 Mass. 190 (1919) (fair cash value for purposes of

property tax); *Commissioner* v. *Worcester County Trust Co.*, Mass. Adv. Sh. (1940) 543, 546 (value for purposes of inheritance tax). The same use in the gift tax statute may not only be presumed for lack of any indication of a different intention but may be conclusively demonstrated by the fact that "value" is stated in the statute, not as something which shall be so whether in fact it is so or not, as the law stipulates that for purposes of the tax "value" shall be *considered* the amount of the gift, but as a concrete occurrence upon which the application of the legal rule shall depend in each case, and such a construction is supported by authority. *Commissioner* v. *Shattuck*, 97 F. (2d) 790, 792 (C. C. A. 7th, 1938); *Ernest A. Cronin*, 37 B. T. A. 914, 920 (1938); Cf. *Miller* v. *United States*, 294 U.S. 435, 439, 440 (1935).

For like reasons it is clear that in ascertaining the fact of market value under the gift tax statute all relevant facts and circumstances must be taken into consideration. That is the rule in determining facts in general and there is no basis in the statute for believing that a different rule was intended. Where there is an actual market for the property in question the facts that need be considered are relatively few. Once it is established that the market corresponds to the standard set by the statute the fact to be found can be ascertained by reference to the records of that market and other facts that might be adduced become irrelevant. A great many more facts will need to be considered, however, where no actual market for the property exists. The problem then is not only to postulate a hypothetical market but to estimate what the property would bring in that market. And this calls for a consideration of all relevant facts and cir-

cumstances bearing upon those questions. *Commissioner* v. *Shattuck,* 97 F. (2d) 790, 792 (C. C. A. 7th, 1938); *Commissioner* v. *Worcester County Trust Co.,* Mass. Adv. Sh. (1940) 543, 545. In such cases, to adopt the language of Chief Justice Hughes, then Mr. Justice Hughes, in *The Minnesota Rate Cases,* 230 U.S. at 434, "It is not a matter of formulas, but there must be a reasonable judgment having its basis in consideration of all relevant facts."

There is nothing in *Lucas* v. *Alexander,* 279 U. S. 573 (1929), it should be observed, which indicates a contrary view. In that case the taxpayer had procured on May 19, 1899 two policies of insurance on his own life and had received on May 19, 1919 the entire proceeds of both policies, including a large amount in tontine dividends which had accumulated under them. There the problem was one of allocating for income tax purposes the taxable gain which had accrued during the period from March 1, 1913 to May 19, 1919. The statute provided that "fair market price or value" should be used as a basis for that determination but this Court was careful to point out that such language must be read in the light of the purpose of the statute to ascertain taxable gains accruing since March 1, 1913 and that, having that in mind, the "value" to be found was "that part of the amount actually realized by the taxpayer which, by the use of appropriate accounting methods, can fairly be said to have accrued before March 1, 1913—*its value then* as compared with *the value in fact later realized* by the taxpayer *taken as a standard.*" (279 U.S. at 579, italics supplied.) That being the standard to be applied under the circumstances of that case, it was as easy to begin with the value on May 19, 1919 and by

using the records of the insurance company work back to the value on March 1, 1913, as it would be in an admitted fair market like the New York Stock Exchange to determine from its records the market value of 100 shares of stock listed on that exchange. The reserve set aside by the insurance company as shown on its books constituted "a complete record and determination of the actual economic gain annually accruing upon the policies which was ultimately realized by the taxpayer" (279 U.S. at 581), and therefore no other facts needed to be considered. This is not authority, however, that a single fact, such as the reserve set up by an insurance company with respect to a life insurance policy, may—or must—be taken as the only fact which is relevant in determining the value of a policy for gift tax purposes. A very different standard and problem is presented in the instant case, i.e. the problem of determining the market value of certain insurance policies as of the date of transfer or gift. It was precisely this problem which Mr. Justice Stone, who wrote the Court's opinion in *Lucas* v. *Alexander,* took pains to point out was not involved in that case. (279 U.S. at 579.)

The Commissioner, himself, recognizes that value for gift tax purposes is a question to be determined upon a consideration of all relevant facts, for he has provided in Article 19 (1) of the 1936 edition of Regulations 79, which deals with the valuation of property in general, that "All revelant facts and elements of value as of the time of the gift should be considered." Indeed in the 1933 edition of the same article he provided that "All relevant facts and elements of value should be considered *in every case.*" (Italics supplied.) In the 1936 edition, however, the requirement

of consideration of all relevant facts, while continued with respect to some forms of property (See Appendix, *infra,* at pp. 59-62), is discarded with respect to life insurance policies. There it is provided in Article 19 (9) with respect to a single premium policy, the type here involved, that the value "is the amount which the company would charge for a single premium contract of the same specified amount on the life of a person of the age of the insured." The single factor of replacement cost is thus made the sole concrete occurrence to be considered in determining the value of a single premium policy and all other facts bearing upon the amount that the policy would bring in a market become irrelevant by *fiat* of the Commissioner.

It was on the ground of this regulation alone that the Commissioner asserted a deficiency in this case (R. 7, 8) and it is this regulation which the Circuit Court of Appeals considered to be controlling in its decision of the case. (R. 44, 45.)

It is submitted, however, that the Commissioner is clearly without power to promulgate such a regulation. The Commissioner is given power by §530 of the gift tax statute, 47 Stat. 259, to prescribe and publish, with the approval of the Secretary, "all needful rules and regulations for the enforcement of" the statute. But the power here conferred does not extend to converting what in the view of the statute is a question of fact, to be determined from a consideration of all relevant facts, into a conclusive presumption or rule which dispenses with proof and precludes dispute. Cf. *Miller* v. *United States,* 294 U.S. 435, 439, 440 (1935). The statute applies to all property alike, as we pointed out in Point I, *supra,* at p. 16, and

no warrant can be found in its language for making value a question of fact with respect to some types of property but a matter of formula or rule with respect to others. There is here no basis for inferring authority to prescribe different regulations "according to the peculiar conditions in each case". Cf. *Helvering* v. *Wilshire Oil Co.,* 308 U.S. 90, 102 (1939). Nor is there here any provision such as that considered in *Second Nat. Bank* v. *United States,* 39 F. (2d) 759, 760 (Ct. Cl. 1930), aff'd, 282 U.S. 409 (1931). The sole authority was to prescribe all *needful* rules and regulations for the enforcement of the Act. It may be admitted that a regulation such as the Commissioner has prescribed might well be *helpful,* not only in the practical administration of the statute, cf. the discussion in Point I, *supra,* at p. 14, but also in increasing the public revenue. But both matters are far from *needful* for the enforcement of the statute. The regulation does not seek to clarify an ambiguity, cf. *Helvering* v. *Wilshire Oil Co.,* 308 U.S. 90, 100, 102 (1939), and the statute is as "workable" and capable of being administered as a practical matter in respect of single premium insurance policies as it is in respect of many other forms of property. If Congress had seen fit to confer upon the Commissioner the power here assumed, we might then be concerned with the Constitutional problem of whether it is arbitrary and unreasonable to make the value of property dependent upon one factor alone. Cf. *Heiner* v. *Donnan,* 285 U.S. 312, 329 (1932); *Lucas* v. *Alexander,* 279 U.S. 573, 577 (1929). But Congress has failed so to *legislate* and the Commissioner, at least in the absence of proper authority, cannot *legislate* for it. The regulation is a nullity. *Helvering* v. *Janney,* U.S. Sup. Ct., Nos. 36 and 113, October Term, 1940, de-

cided December 9, 1940; *Taft* v. *Helvering,* U.S. Sup. Ct., No. 183, October Term, 1940, decided December 9, 1940; *Manhattan General Equipment Co.* v. *Commissioner,* 297 U.S. 129, 134 (1936); *Miller* v. *United States,* 294 U.S. 435, 439, 440 (1935).

This, we point out, is apart from the fact that the regulation is unreasonable in view of the standard of "value" to be applied under the statute, as we shall demonstrate in Point III, *infra.* See *Manhattan General Equipment Co.* v. *Commissioner,* 297 U.S. 129, 134, 135 (1936). It is also apart from the equities involved in substituting a higher measure of value, i.e. replacement cost, for the measure of a policy's "cash surrender value" or "cash value", a measure which the Commissioner himself approved in a regulation that had been in force for more than two years prior to the date of the gift here in question and which many taxpayers, in relying upon that regulation, reasonably believed and still believe is the surest and most accurate measure of market value. Cf. Int. Rev. Code § 3791 (b) (1939); Montgomery, *Federal Taxes on Estates, Trusts and Gifts* (1938-39) 390; Paul, *Studies in Federal Taxation* (3rd series, 1940) note 72 at pp. 441, 442. And compare *Commissioner* v. *Haines,* 104 F. (2d) 854 (C. C. A. 3d, 1939); *Helvering* v. *Cronin,* 106 F. (2d) 907 (C. C. A. 8th, 1939); *Helvering* v. *Bryan,* 109 F. (2d) 430 (C. C. A. 4th, 1940). It is not necessary to deal with such matters where the power to promulgate the regulation does not exist. Cf. *Helvering* v. *Wilshire Oil Co.,* 308 U.S. 90, 102 (1939).

III.

THE BOARD OF TAX APPEALS' FINDING OF VALUE WAS IN ACCORDANCE WITH LAW AND SUPPORTED BY SUBSTANTIAL EVIDENCE AND IT WAS THEREFORE ERROR FOR THE CIRCUIT COURT OF APPEALS TO SUBSTITUTE ITS JUDGMENT OF VALUE FOR THAT OF THE BOARD OF TAX APPEALS.

The power of the Circuit Court of Appeals to modify or reverse a decision of the Board of Tax Appeals, upon review, is strictly limited by statute to a decision that is "not in accordance with law." Int. Rev. Code §1141 (c) (1) (1939). Under the decided cases this means that "The Court of Appeals is without power, on review of proceedings of the Board of Tax Appeals, to make any findings of fact. * * * The function of the court is to decide whether the correct rule of law was applied to the facts found; and whether there was substantial evidence before the Board to support the findings made." Mr. Justice Brandeis in *Helvering* v. *Rankin,* 295 U.S. 123 at 131 (1935). And compare *Colorado Bank* v. *Commissioner,* 305 U.S. 23 (1938), with dissenting opinion of Mr. Justice Black in the same case at 31.

In the instant case the Board of Tax Appeals, after considering all the evidence, which included a stipulation of certain facts (R. 11-15) and the testimony of witnesses (R. 25-38), made a specific finding of fact that *"The total value of the gifts when made in 1935 was $233,360.30."* (R. 19.) This was the amount reported by the petitioner in her return pursuant to information furnished her by the respective insurance companies (R. 8, 13, 14), and it was the decision by the Board that this amount was the best evidence of the

value of the property which was the subject of the gift that the Circuit Court of Appeals had before it for review.

We have set forth in Points I and II, *supra,* the rules of law which we submit were applicable to the evidence in this case. The same rules were expressed cogently and with much force by the Board of Tax Appeals in its opinion in *Ernest A. Cronin,* 37 B. T. A. 914 (1938), a case involving the same issues that are here presented but with respect to single premium policies in different amounts and at different ages. The reference to that case in the Board's opinion here (R. 19) shows that the Board had those same principles in mind in dealing with this case.

There can be no question, moreover, but that the correct rules were properly applied in this case. The problem, as the Board pointed out expressly in the *Cronin Case* was to find the "market value" (37 B. T. A. at 921, 922) of the policies involved, and that was "a question of fact to be determined from all the attendant circumstances." (37 B. T. A. at 920.) The same regulation that is relied upon by the Commissioner in this case was the basis for the Commissioner's determination there. But the Board rightly held that it was not "within the province of the Commissioner to prescribe by regulation a restricted method for determining the value of any particular class of property." (37 B. T. A. at 920.) Many factors must be taken into consideration, for no *single* factor will *conclusively* establish market value. (37 B. T. A. at 921.) The evidence afforded by the record must be considered in each case. These then were the principles to be applied, and applying them, the Board reached the conclusion that the *best evidence*

before it in the instant case (R. 19), as in the *Cronin Case* (37 B. T. A. at 921, 922), was the amount for which the policies could be surrendered to the respective companies. The Board therefore found that amount as the fact which it was under a duty to determine in this case. (R. 19.)

That the Board's approach to the problem was the correct one is further shown by the scope of the evidence which it admitted (R. 11-15, 25-38) and considered (R. 19), and by the extensive findings which it made. (R. 15-19.) The very policies in question were in evidence (R. 25), and all of the essential data with respect to the rights which had accrued or were to accrue under each policy were either stipulated (R. 13-15) or in evidence. (R. 25, 27, 30, 32.) There was testimony that the policies were readily assignable without regard to whether the assignee had an insurable interest in the insured. (R. 33.) The premium cost of each of the policies and the amount for which each could be surrendered to the respective companies on the date of the gift were stipulated. (R. 11-14.) The manner in which the insurance companies determined how to meet their obligations under those contracts was fully explained. (R. 26.) The reasons for the difference between the amount of the premium and the amount set aside by each company as a reserve to meet the aggregate claims that would be made against it were related. (R. 26.) There was a full explanation of the method by which the companies determine the amount that should be paid to any one desiring cash in exchange for a policy, i.e. the amount which is generally referred to as the "cash value" or "cash surrender value".

(R. 26, 27.) All of the facts with respect to the property itself were thus a part of the record in this case.

But there was more than this. There was also evidence of actual transactions which might be considered to constitute or at least to approximate a market exchange. The fact that policies in general were often transferred to banks and insurance companies as security for loans was a part of the evidence. (R. 33, 34, 36, 37.) And there was testimony by experts with respect to the prices in such a market (R. 34, 36, 38) and the highest price available in any market. (R. 34, 35.)

In brief, every available item of evidence was produced and considered in a bona fide attempt to make the determination one based upon a consideration of all relevant facts.

With evidence of this scope before it, the Board weighed the competing considerations and reached the conclusion that the value of the policies at the respective dates of gift, on the record before it, was the amount which the respective insurance companies would pay on those dates in exchange for the surrender of all rights under the policies. (R. 19.) This was the Board's best judgment as to the fact to be found under the statute.

It is submitted that this finding was supported by substantial evidence and by reason as well. Indeed, as a review of the record would show, there was in fact no evidence before the Board in this case which would support a finding that a higher amount could ever actually be obtained upon an exchange of the policies. Under these circumstances it is entirely

reasonable that the Board should consider the highest amount which on the evidence before it was obtainable as the best evidence of market value.

The fact that other authorities have reached a different conclusion on a different record and with respect to apparently similar but essentially different problems does not show that the Board's conclusion in the instant case was unreasonable. The cases relied upon by the Circuit Court of Appeals for the Second Circuit in *Guggenheim* v. *Rasquin,* 110 F. (2d) 371 at 372, 373 (1940), for example, are actually concerned with different problems than that with which the Board was faced here. Those cases, of which *New York Life Ins. Co.* v. *Statham,* 93 U. S. 24 (1876), *People* v. *Security Life Ins. Co.,* 78 N. Y. 114 (1879), *Toplitz* v. *Bauer,* 161 N. Y. 325 (1900), *Speer* v. *Phoenix Mutual Life Ins. Co.,* 36 Hun. 322 (1885) and *In re Albert Life Assurance Company: Bell's Case,* L. R. 9 Eq. Cas. 706 (1870) are representative, are cases in which the question was the *measure of damages* in actions for conversion of a policy, for breach of an insurance contract, in allowing claims against insolvent life insurance companies and in determining the *equities* where a policy has lapsed without fault of either party, and are therefore actually beside the point.

Except in *New York Life Ins. Co.* v. *Statham,* the inquiry in all of those cases was directed not to what the policies would bring in a market, but to what was necessary to indemnify *the plantiff* so that *he* would be in as good a position as before the conversion or breach of contract. Where that is the problem, the fundamental inquiry is not what it would cost a member of the general public to indemnify himself but

what that cost would be to the *particular plaintiff*. See 5 Williston, *Contracts* (Rev. Ed.) § 1343. The distinction is comparable to that which, as we have shown in Point I, *supra,* exists between market value and value to the owner. That this is true is clearly shown by the standard of value which was held applicable in *Speer* v. *Phoenix Mutual Life Ins. Co.,* which was an action to recover damages for breach of contract in refusing to receive the premiums on a policy and continue it in force. In that case the court said:

> "When the company broke this contract and the plaintiff decided to sue for damages instead of compelling the continuance of its contract, he was entitled to recover a sum that equalled the value *to him* of the policy; or in other words, that would make good *to him* the loss *he* sustained by its breach." (36 Hun. at 325, italics supplied.)

On the basis of this standard it was properly held that the correct measure of the damages to the plaintiff was what it would cost him to obtain a similar policy in another company. But this, it will be seen, is very different from holding that cost is the best evidence of value where the standard to be applied is market value, and not value to the particular owner.

In one of the cases, *New York Life Ins. Co.* v. *Statham,* the inquiry was directed not to the market value or what it would cost the plaintiff to indemnify himself, but to what should be returned to the insured in order to avoid *unjust enrichment* on the part of the *company.* The policy had lapsed during the Civil War and the company could not be compelled in equity to revive it. At the same time, the lapse had not been due to the insured's fault and

it would be unjust and inequitable to require him to forfeit the premiums already paid. In this situation it was decided that the company should pay back to the insured the difference between the premiums paid and the value of the assurance enjoyed by him while the policy was in existence. If the company was properly run it would have this "equitable" value, as it was called, already set aside in a reserve fund. Substantially, that fund was the insured's property, and in equity, therefore, that was the amount which should be returned in order not to enrich the insurance company at the expense of the insured. While this, as it will be seen, is some indication of what was thought to be the amount by which the company would be enriched if the "equitable value" of the policy was not returned, it is far removed from a determination of the market value of a policy.

Every one of the cases relied upon in the *Guggenheim Case* is thus actually beside the point and the most that they can be taken to show, for our purposes, is that in other situations where other standards of value have been involved a different conclusion as to the best evidence of the particular value in question has been thought reasonable.

Indeed, if the question of authority is concerned, there are other authorities of equally high standing who have concluded that the amount considered here by the Board to be the best evidence of the value of the policies, is the best evidence for purposes not unlike those involved in this case. Congress itself, for example, has approved cash surrender value as the best measure of value for purposes of the Bankruptcy Act. In § 70 a. (5), 52 Stat. 880, the bankrupt is given the right to redeem an insurance policy on

his own life and payable to him or his personal representatives by paying or securing to the trustee the amount of the cash surrender value. This obviously saves to the bankrupt any special or unique advantages which the policy may have for him, but certainly if there were any higher market value for the asset, the bankrupt's creditors should have the benefit of it. Congress has shown here that it does not think there is. Similarly, the Interstate Commerce Commission has adopted cash surrender value as the best evidence of value for purposes of the Uniform System of Accounts for carriers subject to the Motor Carrier Act, 1935, promulgated November 29, 1937, and effective January 1, 1938. Indeed, the majority of our Circuit Courts of Appeals have shown in their decisions on the very question at issue here, but with respect to different policies and different circumstances, that they believed that a conclusion such as the Board has reached here would be reasonable. Cf. *Ryerson* v. *United States,* 114 F. (2d) 150 (C.C.A. 7th, 1940); *Helvering* v. *Bryan,* 109 F. (2d) 430 (C.C.A. 4th, 1940); *Helvering* v. *Cronin,* 106 F. (2d) 907 (C.C.A. 8th, 1939); *Commissioner* v. *Haines,* 104 F. (2d) 854 (C.C.A. 3d, 1939); *Blaffer* v. *Commissioner,* 103 F. (2d) 489 (C.C.A. 5th, 1939); *Farish* v. *Commissioner,* 103 F. (2d) 1011 (C.C.A. 5th, 1939). The fact that these authorities have approved of cash surrender value as the best approximation of the value here in question is proof, if any is needed, that the judgment of the Board of Tax Appeals in this case was not unreasonable.

But the reasonableness of the conclusion reached here by the Board of Tax Appeals may be demonstrated by much more than the concurrence of other

authorities. It is the petitioner's contention that a careful analysis of the matter will show persuasive and compelling reasons why the Board's finding is not only not unreasonable but is actually the most reasonable conclusion that could be reached in a determination based upon a consideration of all relevant facts.

In making this approach it should be borne in mind, of course, that the reasonableness of the conclusion that the amount of the "cash surrender value," as it is sometimes called, is the best evidence of market value, should not be prejudiced by the *name* that is given to that amount. It could just as well be called the "cash value," as it is in fact in many contracts, and that would have equally effective connotations of market value. That which in the judgment of the Board was the best evidence of market value in this case is *essentially* the amount that could be obtained by the policy owner on the day of the gift in exchange for the surrender or release to the company of all rights under the contract. It is the reasonableness of concluding that that exchange was, under the circumstances of this case, the most accurate approximation to the exchange contemplated by the standard to be applied under the statute, that is in question.

That standard, as was shown in Point I, *supra,* is the amount at which the property would change hands in a fair market, not the amount that the particular owner thinks the property is worth to him, and it is that standard which is to be applied regardless of the nature of the property. If it is assumed, for the moment, that there is in fact no actual market in which the rights under an established policy are ex-

changed and to which easy reference can be made, a hypothetical market for those rights must be postulated according to the standard set by the statute. It will be necessary to consider what under the circumstances of this case is the best evidence of the amount that a buyer could reasonably and fairly be persuaded to pay for the rights which would be his under the insurance contract.

It is submitted that if this approach is made, an analysis will clearly show that the amount that such a buyer would be able to obtain from the respective insurance companies in exchange for the surrender or release of those rights is the best evidence of the amount in question.

It is obvious that in putting ourselves in the place of a prospective buyer the essential features of the property must be considered, and in the case of an insurance policy, it is equally obvious that the most important feature is the fact that upon certain contingencies various sums of money are payable under the policy. For our purposes it is enough to realize that in the case of an ordinary straight life policy, one of the types here involved, the policy may be assumed to be calculated to mature at the end of the insured's life expectancy. An endowment policy, on the other hand, which is the other type here involved, is calculated to mature at the end of a fixed period of years. In either case, however, if the insured dies before the expected time the face amount of the policy is payable at once. One can never be sure under either type, therefore, when the face amount of the policy will be payable. In view of this fact, it can hardly be expected, it is submitted, that one who purchases either type of policy from the insured would be will-

ing to hazard a guess himself as to the possibility that the insured will die before the average of his class or the end of the endowment period. A buyer, as Mr. Justice Holmes said in *Ithaca Trust Co.* v. *United States,* 279 U.S. 151 at 155 (1929), is necessarily required to make "more or less certain prophecies of the future" in a good many instances. But it is asking a great deal of him to estimate the respective chances of having a right to the proceeds of a policy before the expiration of the insured's life expectancy or before the end of the endowment period, and expect him to pay *in cash* an amount any different from the amount that the particular insurance company calculates to be the amount which will mature at the required time. A buyer, we submit, would not take such chances. Indeed we doubt whether anyone would be willing to pay cash in consideration of a sum to mature at an uncertain time in the future dependent upon the life of an individual unless he could pool the same risk with respect to a large number of persons as do the insurance companies. In this case the insurance companies have assumed the risk of uncertainty with respect to the life of the insured under each contract, but a buyer who is considering the present worth of the rights under the respective policies, i.e. the face amount of the policy discounted according to the time he may be expected to have to wait for actual payment, may hardly be expected to base his offer on any different estimate than that which the insurance companies have made with respect to the very policies under consideration. Cf. *Ryerson* v. *United States,* 114 F. (2d) 150 at 153 (C.C.A. 7th, 1940). Such companies he will reasonably regard as experts in the fields of actuarial methods and of investment, the fields of knowledge

obviously involved, and he, therefore, may hardly be expected to consider himself one to question their judgment. In view of these facts, it is submitted that a prospective buyer could not be reasonably and fairly expected to offer more in the instant case than the amount of the reserve set up by the respective insurance companies.

It is our contention, however, that even the amount of the reserve is too high an estimate of the amount at which the policies here might be expected to change hands in a market. There are buyers conceivably who would be content to let time take its course in the assurance that sooner or later they *or their estates* would receive the money due under the policies. But the contingency upon which that money would be payable in every case is the life of another person, and in that situation, most men would be impressed by the amount into which the policies could be converted within a reasonable time after the decision to dispose of them. Especially would this be so where the general advantages conferred by the property, i.e. those that would appeal to probable buyers (see Point I, *supra,* at pp. 17-19), are so small in number as they are in the case of an insurance policy. The person who takes out insurance on his own or another's life usually has in mind advantages that will accrue to him not only in the way of savings, which to some owners are very sound and worthwhile advantages, but also in the form of protection against undesirable situations that might occur in the event of the insured's death before the expected time. The latter advantages, however, pertain to matters in which the person taking out the insurance has a personal interest, an "insurable interest" as it is called

in the law, and those advantages therefore are necessarily peculiar to that person. Such advantages, while important in the determination of value to the owner, have little bearing in reality upon the price that property will bring in the market, and are therefore properly excluded from consideration where the standard to be applied is market value as it is in this case. See Point I, *supra*. The general advantages in the present case, it is submitted, cluster about two rights, the right to receive one sum in cash at an uncertain time in the future, and the right to receive another sum whenever it is desired. But the first of these dwindles into insignificance, in comparison with the second, when it is realized that as a buyer or owner of the policy one may die before it can ever be realized. Especially is this so where the possible advantages which may be conferred by the rights under the policy upon probable buyers are primarily those which are conferred by any right to receive a sum of *money*. In the face of these circumstances it is submitted that a buyer would not be thought unreasonable or unfair in believing that the rights under the respective insurance policies here were worth no more than what he could get for them *in cash* at any time that he chose to receive it.

A buyer normally thinks first of the advantages which he himself can reasonably expect to have from the property, but in that connection, one of the advantages which very often looms largest is the price at which he can resell the property to others. This is even more true where the property in question is freely assignable as it is here. (R. 18.) Cf. *Lucas* v. *Alexander*, 279 U.S. 573, 578 (1929). And this thought tends to make the prospective buyer's offer conserva-

tive where there is any doubt as between a certain price and a possible higher one as yet undetermined. If it is thought, therefore, that in this case there would be possible higher prices in the mind of the buyer it is submitted that this consideration in the present case would induce him to believe that he could not reasonably go beyond the *certain* amount.

It is submitted, therefore, that if the problem here is approached on the assumption that there is no actual market for the rights involved, there are persuasive and compelling reasons for concluding as did the Board of Tax Appeals that the best evidence of the amount that a buyer could reasonably and fairly be expected to pay for those rights is the amount that he could get for them from the insurance companies themselves. The very considerations that make this conclusion reasonable with respect to a fair buyer, moreover, make it equally reasonable with respect to a fair seller. On our hypothesis we are dealing with fair and reasonable men.

We have assumed, for the purposes of argument, that there is in fact no actual market which corresponds to the "fair market" set by the standard of value under the statute and approved by the Commissioner in his regulations, and that therefore it is necessary to postulate a hypothetical market for the rights which are here in question. But let us consider whether that assumption is justified. If the differences between the "market" set by the standard and the "market" to which the Board of Tax Appeals referred in this case are *immaterial* for purposes of applying the standard prescribed by the statute, it is submitted that the Board's conclusion here was the most reasonable that it could possibly have made.

In making this approach it will be realized in the first place that *legally* there is the same transfer of the *entire* "bundle of rights" in the property, in an exchange of an insurance policy for surrender, that there is in a sale or any other complete exchange. The essential legal difference between the two is that in the one that exchange is made in the exercise of a legal right in one party and pursuant to a corresponding legal duty in the other, whereas in the ordinary sale the exchange may be decided upon by both parties without reference to any legal duty. We have here to consider then whether that essential legal difference is of any real significance so far as the application of the standard of market value is concerned. If, under the circumstances of this case, there is nothing to indicate that the parties to an exchange of the policies would in fact act any differently, if both were free to decide at the time of the exchange whether to make the exchange or not, that difference, it is submitted, is immaterial and of no importance in reaching a conclusion with respect to the question at issue.

The Commissioner has argued that the "cash surrender market" which exists for the exchange of all rights under a policy is in truth a forced market, where both parties are not free from compulsion to buy or to sell, and that therefore a really fair market must be assumed. We do not deny the validity of the Commissioner's regulation on which this argument is based, for if it is true that the *special* advantages which the *property* has for an owner are not to be considered in applying the standard of market value, it is equally true that the *special* advantages which the *money* that is exchange for that property will have

for him should likewise be excluded. See Point I, *supra,* at pp. 16-18. Our contention is that so far as the price which an insurance company pays for the rights under a contract in the cash surrender market is concerned, this argument will not stand analysis.

A forced market, as indicated by the Commissioner's regulations (Treasury Regulations 79, Art. 19 (1)), is one where one of the parties is forced by some compulsion of one sort or another to accept or to give in exchange for property an amount different from that at which the property ordinarily changes hands among those who are not acting under that compulsion. It is to be observed, however, that since in a market the parties are dealing at arm's length, a "compulsion", to have this effect, must be of a sort that will enable the other party to take advantage of it. If the man with the portrait is badly in need of cash and is selling the portrait for that reason, the purchaser from him is unable to take advantage of that situation unless he senses that it exists. Otherwise his offer will be made on the basis of what in his opinion the seller might reasonably be expected to accept. Thousands of sales are made every day, in all sorts of admitted fair markets, where the person making the sale is doing so in order to get money. But unless the other party realizes that the seller is especially in need of money and will sell at lower figure than reasonable in order to get the needed money at once, instead of at some future time, the compulsion with respect to the seller does not operate and the market is as "fair" as in any other arm's length transaction.

It is submitted that so far as the exchange which takes place when the rights under a policy are trans-

ferred to a company in return for money is concerned, the fact that the insured is exercising his right to have the money, in order to satisfy a pressing need for cash, is of no effect whatever upon the *amount* of money which he obtains. It makes no difference whatever so far as the amount paid by the insurance company is concerned, whether the policy is surrendered in order to pay for a serious and unexpected illness or because the insured's family is no longer dependent upon him and the money can be more useful to him in other ways. Whatever the reason the amount of money obtained will be the same, and no amount of waiting or freedom from compulsion will ever change that sum. Indeed, the very factor that constitutes the only legal difference in essence between that exchange and the ordinary sale, i.e. the fact that the insurance company is under a legal duty to pay the amount in question, is the very thing that *prevents* fluctuation in the amount according to the practical needs of the other person. The amount cannot fluctuate because it is fixed by a legal duty owed to the insured.

If it is suggested that the price is nevertheless "forced", because the insured has to accept what the contract provides, and that that is lower than the situation warrants, let it be remembered that actually the insured does *not* have to accept what the contract provides. Even at the time that the contract is made the parties are not dealing entirely at arm's length. Probably no other business has come more closely under the scrutiny of the legislators and other public officers than the insurance companies. Investigations like that conducted by the Hughes Committee in New York have done much to reveal such evils as existed.

The insurance companies are not only "mutualized", but they are considered as occupying a position of public trust. Under these circumstances it can hardly be said that the insurance company is in a position to take undue advantage of the insured.

The company from whom the insured buys is not the only company selling insurance. There are, as the statistics in the Appendix, *infra,* at pp. 62-69 show, hundreds of companies in fact doing ordinary life insurance business in the United States. Their contracts are not all the same with respect to the "cash value" or the "cash surrender value", and the insured is as free to choose between them as he is between Ford or General Motors or Chrysler.

The fact that so many companies have the same provisions with respect to the "cash value" or the "cash surrender value" is in itself good evidence that the provisions are not arbitrary or unfair. As the testimony in this case showed (R. 27, 31), there are fully adequate reasons in sound insurance practice for making the amount of the "cash surrender value" what it is. Indeed, if this were not so, it is certain that the legislative committees and other public bodies interested in life insurance would insist that they be changed.

It is familiar knowledge, moreover, that the number of policies surrendered each year is substantial in comparison with the number that are issued during the same period. As Mr. Justice Stone pointed out in *Chase Nat. Bank* v. *United States,* 278 U. S. 327 at 335 (1929), the right to surrender a policy is of substantial practical importance in the affairs of men, and the number of policies surrendered each year as

shown by the statistics, see Appendix, *infra*, at pp. 62-69, bear him out in this. The fact that so many policies are surrendered is certainly some evidence that those surrendering them thought the amount obtained fair and not unreasonable.

It is submitted, therefore, that the amount obtained upon the surrender of a policy is as fair as every other element in the contract to which the parties freely agree, and that in the case of the single element as in the case of all of the elements, the "market" for exchange with the respective insurance companies themselves may be reasonably thought to be as nearly like the "fair market" contemplated by the standard of value applicable under the statute as any admitted actual market.

Indeed, one may reasonably ask, in view of the large number of policies outstanding (see Appendix, *infra*, at pp. 62-69), why another different and real market for the rights under those policies has not appeared if the "actual" or "intrinsic" value of those rights is such as to justify a different price than that which exists in the cash surrender market. The fact of the matter is, as the testimony in this case showed (R. 33-38), that no one, not either banks or corporations or other insurance companies or anyone else, will manifest any belief in the existence of those "actual" or "intrinsic" values by paying a higher amount for the rights here in question than the price which exists in the cash surrender market. The fact that a different and "really fair" market has not actually appeared is in itself good reason for reasonably believing that none "should" exist.

If all of these reasons are taken into account, it is submitted that the Board of Tax Appeals might reasonably believe that reference to the cash surrender market was reference to an actual market within the meaning of the standard which was applicable under the statute.

On either approach therefore, on the assumption that there is no actual market and one must therefore be postulated, or on an analysis of the reasonableness of that assumption itself, there are impressive and forceful reasons for concluding as the Board did in this case.

That this is so is even more apparent when the reasonableness of replacement or premium cost as the best evidence of market value is considered. We would be the last to deny that the cost of a policy is in many cases good evidence of what the applicant for insurance thinks the advantages conferred by a policy will be worth to him under his present circumstances. But it is submitted that the *premium* which the applicant pays for the policy is not *conclusive* evidence of its worth to him even according to that standard. The applicant may think the policy of such value to him as to have engaged insurance counsel to advise him or to have made other out-of-pocket expenses that in his opinion were necessary in obtaining the policy. He may actually think that he has a bargain and that because of what he himself thinks he knows of his own health or because of an extraordinary sense of responsibility for his family's welfare he would not part with the policy for a great deal more than the amount of the premium. This is certainly true in most cases if at a later period the in-

sured becomes uninsurable and can obtain from no other source the advantages which his policy gives him. On the other hand, there are circumstances which may make the advantages of the policy compared to the advantages of the money which he pays for it of very small importance. The insured may at the time have such wealth that the difference between his estate, with the proceeds of the policy and without them, would make very little practical difference in the ability of his dependents to maintain the standard of living which he wishes for them. Or, if the premium cost was once a fair measure of the value of the policy to him, the situation of his dependents, which may have been the principal factor in his case in making it so, may change so that they are not only not dependent but actually have independent means far in excess even of his own. In that case the cash obtainable under the policy would be the most important factor for him because of the advantages in the way of better living that would be available with it. But at such a time the replacement cost would obviously be far in excess of the value even to him. Depending upon the particular case, many other *subjective* factors might enter in, but these are enough to show why the single factor of replacement cost which the Commissioner has prescribed as the sole test is not conclusive evidence even for determining value to the owner, not to speak of its conclusiveness in determining exchange value in the market. They are also ample illustration, if any is needed, to show why Congress could have decided simply for practical reasons that the standard of value to the owner was not a wise standard to prescribe in the statute.

But the fallibility of the premium cost as a measure of the value of a policy at the time of the gift is further apparent when it is realized that it is the value of the rights under the policy *at that time* that is in question and not the value of the policy at or before the time that it is issued. A buyer of the property at the time in question under the statute is interested not so much in what some one else got for his money, but in what that person can give to him and what he can get from that person. But even to the extent that he is interested in what the other person has paid for the rights he is offering to exchange, the *premium* cost paid by that person will be discredited when he realizes that so far as he is concerned the same rights could have been got by his seller at a cheaper rate in an equally dependable company, or even less the cost of a commission if they had been purchased from a savings bank under the system of insurance now existing in New York and Massachusetts and for which Mr. Justice Brandeis has been so largely responsible.

The amount of money that a policy costs, it should be remembered, is not the subject of the gift in this case. A gift of the amount of money represented by the single premium would be a very different gift from a gift of the rights under the policy. The advantages that each is capable of conferring are totally different. For purposes that need not concern us here, the donor has made a gift of a policy, not of a sum of money, and it is the value of the policy, i.e. the advantages which the rights under the policy confer, that is in question. The Circuit Court of Appeals for the Second Circuit thought in *Guggenheim* v. *Rasquin*, 110 F. (2d) 371 at 373 (1940) that

a similar question to that here involved was "touched" by Regulations 79, Art. 2 (6) which provides that "Where premiums on a life insurance policy are paid by an insured who has none of the legal incidents of ownership in the policy, and the beneficiary is other than the insured's estate, each premium payment is a gift in the amount thereof." But it is submitted that it is not a gift of the premium which has been made here, but of a very different form of property, and it is therefore a mistake to assimilate the two.

We maintain, therefore, that there are persuasive and compelling reasons not alone for concluding that cash surrender value was under the circumstances of this case the best evidence of the value to be found under the statute; there are also equally impressive reasons for believing that the replacement cost of the policy, the factor which the Commissioner has provided shall be the sole test, is not only not within the Commissioner's power under the statute to promulgate but is actually so unreasonable as to be void if it were thought that the necessary power existed. See Point II, *supra,* at pp. 24-26. When all of the considerations are taken into account it can hardly be said, we believe, that the Board of Tax Appeals' finding in this case was not supported by substantial evidence and by reason as well.

This Court has held that where this is the case the Circuit Court of Appeals should not disturb the Board's finding and substitute its judgment with respect to the competing considerations that are involved, simply because it would have reached a different conclusion on the same facts. *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U. S. 37, 40 (1937). This

rule, it is submitted, is not without a sound and reasonable basis, and it is only nullifying the rule to reverse the Board's decision and remand the case for further proceedings which under the rules given in the court's opinion exclude the possibility of making any other decision than that which the Circuit Court of Appeals, having itself weighed the competing factors, decided was correct. It is submitted that this is the actual effect of the decision and opinion of the Circuit Court of Appeals for the First Circuit in this case.

The opinion of the Circuit Court of Appeals states that its decision in this case need not be "turned" entirely upon a consideration of the regulation of 1936 (Regulations 79, Art. 19 (9), reprinted in Appendix, *infra,* at pp. 61-62), as against the regulation of 1933 (Treasury Regulations 79, Art. 2 (5), reprinted in Appendix, *infra,* at p. 56) which was in effect at the time that the petitioner made her gifts in 1935. (R. 42-45.) The inference from this, of course, is that it is enough for purposes of this case to look at the regulations themselves and not to go any deeper into the problems that are involved. The petitioner, it should be said, did not, as the court indicates (R. 42), rely upon the 1933 regulation as authority for her position. Nowhere in her brief or argument was there any reliance upon that regulation as a regulation. But if that had been the case, it is submitted that it is not enough for the purposes of this case simply to consider the regulations on their face. The court's opinion does, it is true, state the rule that a regulation which is inconsistent with the language of the statute and arbitrary and unreasonable is invalid. (R. 43.) But no reasons are given for the

court's decision that this is so with respect to the 1933 regulation, but not so with respect to the 1936 regulation, apart from such inferences as can be drawn by the discussion to which we shall hereafter refer. So far as the regulations are concerned the opinion merely states a conclusion with respect to the problem involved.

But the opinion is almost as unsatisfactory in dealing with what it apparently considers to be the "merits" of the matter. Here again there is a statement, at least, of the principles which we maintain are applicable here and on which we relied in our brief and argument before that court. Thus it is stated that "the value of a single premium life insurance policy must mean the fair market value, if there is such a value, and, in any instance, must be based upon a consideration of all of the relevant facts and elements." (R. 45.) There is no discussion of the Commissioner's regulations in the light of these principles, however, and their application in the opinion to the facts of this case give credence to the thought that no careful application was made.

As if to bolster a decision that had already been reached, the opinion starts out with respect to this phase of the consideration by stating that "The Board below has found that the cash surrender value of a policy is an *arbitrary* figure arrived at by the insurer by deducting from the reserve set up under the policy a so-called surrender charge." (R. 45, italics supplied.) But a careful reading of the memorandum findings of fact and opinion by the Board (R. 15-19) will disclose no such finding. From this statement and other statements hereafter discussed the opinion

draws the conclusion that the cash surrender value of a policy is not its "real" or "true" value, and, adopting the argument of the Commissioner, that it actually represents a price in a "forced" market if the market set by the statute is taken as a standard.

An appeal is then made to a *reductio ad absurdum* and it is pointed out, that with respect to one of the policies at least, an application of cash surrender value as the "true value" would result in there being no value because the insurance company was under no *legal* obligation to pay a cash surrender value at the date of gift. Cf. *Guggenheim* v. *Rasquin,* 110 F. (2d) 371, 373 (C.C.A. 2d, 1940). But this ignores the fact that the parties themselves had stipulated that a price would be obtainable in the cash surrender market on the date of the gift. (R. 13, 14.) It would also seem to indicate that in the opinion of the court the gift of a policy would go untaxed if the company could not be compelled legally to pay a cash surrender value at the time that the gift is made. It is submitted, however, that in view of the fact that the companies in this case would actually pay the discounted value of the first cash surrender value under the policy, whether they were legally bound to or not, and of the further fact that not unfrequently a present sum is paid for a sum payable in the future, that the Commissioner's own stipulation is much more in accord with the standard to be applied under the statute. Cf. *Hiscock* v. *Mertens,* 205 U.S. 202, 211, 212 (1907).

The final argument in the court's opinion is based upon the observation that "A single premium insurance policy is unlike most property which is made the subject of a gift, in that it seems to have no depreciation." (R. 46.) The policy at the date of

issuance is worth the cost, the argument runs, and since the entire premium in each case has been paid and "Nothing but the passage of time is needed to increase their value to the higher face value of the policies" (R. 46), it is unreasonable to believe that the "true value" at a later period in time is any less than the value at the beginning. This, of course, starts out with the assumption that the premium cost of a policy is the correct measure of value under the statute, which we do not admit. We agree that the value of a policy increases as time goes on just as the premium rates and the cash surrender values increase with time. But it is fallacious, we submit, to argue that because the value according to one standard, i.e. market value, is lower at a later date than the original value according to another standard, i.e. value to the particular owner, the lower value cannot possibly be the "true value" of the policy at the later date. We maintain, as we have shown in Point I, *supra,* that the standard of value to be applied under the statute is market value, and not value to the particular owner.

On the basis of this reasoning "it necessarily follows", thought the court, that "the theory that the cash surrender value of the policies, or even the reserves of the policies, was the test of their value on the date of transfer" must be rejected and that "the Commissioner assessed the tax on the *minimum* proper basis, namely the cost of the policies to the donor." (R. 47, italics supplied.) In view of the considerations that were before the Board, it is submitted that reversing its decision and remanding the case for further proceedings not inconsistent with this opinion, as the court did in this case (R. 47),

left no discretion to the Board whatever, and in effect required it to substitute for its own finding of value the finding which the court for the reasons that have been discussed thought correct. For Magruder, J., concurring, many of the problems here involved were "not clear" (R. 47), but it is submitted that upon careful analysis they are clear and that it was error for the court to rule as it did.

At this time when the validity of the very principles of appellate review of administrative findings, here involved are being challenged, it is especially important that no impression should be gained that they are really two-faced and can be used in one way or another according to what the appellate court thinks is desirable in the particular case. In this instance the administrative body in question is one of high repute and expert without question in the field of fact and law which it administers. In its history there has been no suggestion that it regularly favors the Government over the private individual or the private indiyidual over the Government. There has been no hint of prejudice. Cf. 18 Ops. Att'y Gen'l 246 (1885). Withal, it stands as an administrative body whose opinions may be respected. When, therefore, as in the present case, it has made a sincere attempt to perform its duties under the law in the best way that it knows how in a case such as the present, and there are abundant reasons for supporting the conclusion it has reached, a special effort should be made to carry out the principles of appellate review of administrative findings with respect to that finding both in spirit and in truth. It is clear as we have pointed out that a decision in support of the Commissioner's regulation will increase the public

revenue at a time when that revenue is sorely needed, but it is submitted that under the proper construction of the statute it is for Congress to make the change and not for either the Commissioner or the appellate courts. In that manner will the interests of both the tax law and the administrative law best be served.

CONCLUSION

It is submitted, therefore, that the correct rules of law are clear and that the Board of Tax Appeals properly applied them in this case; that the Board's finding was unquestionably supported by both substantial evidence and persuasive and compelling reasons; and that the Board's decision was therefore "in accordance with law" and the Circuit Court of Appeals without power to modify or reverse it. For these reasons, it was error for the Circuit Court of Appeals to reverse the decision of the Board of Tax Appeals and remand the case for further proceedings not inconsistent with its opinion. The court's final decree so providing should be reversed and the decision of the Board of Tax Appeals affirmed.

Respectfully submitted,

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Attorney for the Petitioner.

ROBERT VANCE BROWN,
Of Counsel on the Brief.

Boston, Massachusetts.
December, 1940.

APPENDIX

THE GIFT TAX STATUTE.

Revenue Act of 1932, c. 209, 47 Stat. 245:

Sec. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift.

* * * * *

Sec. 506. GIFTS MADE IN PROPERTY.

If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift.

* * * * *

THE GIFT TAX REGULATIONS.

Treasury Regulations 79, promulgated under the Revenue Act of 1932, **as approved October 30, 1933:**

Art. 2. *Transfers reached.*—The statute imposes a tax whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. * * * In the following examples of transactions resulting in taxable gifts, it will be understood that the transactions occurred after the date of the enactment of the statute (June 6, 1932), and were not for an adequate and full consideration in money or money's worth:

* * * * *

(5) The irrevocable assignment of a life insurance policy, or the naming of the beneficiary of a policy without retaining any of the legal incidents of ownership therein, constitutes a gift in the amount of the net cash surrender value, if any, plus the prepaid insurance adjusted to the date of the gift.

(6) Where premiums on a life insurance policy are paid by an insured who has none of the legal incidents of ownership in the policy, and the beneficiary is other than the insured's estate, each premium payment is a gift in the amount thereof.

* * * * * *

Art. 19. *Valuation of property.*—(1) *General.*—The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. Where the property is sold within a reasonable period after the date of the gift, and it is shown that the selling price reflects the fair market value thereof as of the date of the gift, the selling price will be accepted as the amount of the gift. All relevant facts and elements of value should be considered in every case.

(2) *Real estate.*—In returning a gift of real estate, the local assessed value thereof should not be returned as the value of the gift unless such value represents the fair market value of the property as of the date of the gift. * * *

(3) *Stocks and bonds.*—The value of stocks and bonds listed upon a stock exchange should be determined by taking the mean between the highest and lowest quoted selling prices upon the date of the gift, except where such selling prices do not reflect the fair market value of the gift. * * *

Where, as to any particular security, conditions of sale or ownership are such that the fair market value, determined as already indicated, would not afford a proper basis for valuation, the Commissioner, on final audit, will establish the value by considering all relevant factors. In any case where the donor contends that the value as established by the general rules already given is not the fair market value as of the date of the gift, the evidence upon which he bases his contention should be filed with the return. * * *

(4) *Interest in business.*— * * * A fair appraisal as of the date of the gift should be made of all the assets of the business, tangible and intangible, including good will, and the business should be given a net value equal to the amount which a willing purchaser, whether an individual or a corporation, would pay therefor to a willing seller in view of the net value of the assets of the business and its demonstrated earning capacity. Special attention should be given to fixing an adequate figure for the value of the good will of the business.

The factors hereinbefore stated relative to the valuation of other property, where applicable, will be considered in determining the valuation of a proprietary or partnership interest in the business. All evidence bearing upon such valuation should be submitted with the return, including copies of reports in any case where examinations of the business have been made by accountants, engineers, or any technical experts as of or near the date of the gift.

(5) *Notes, secured and unsecured.*— * * *

(6) *Intangibles.*—Intangibles not specifically mentioned in this article should be valued in accordance with the rule laid down in subdivision (1) of this article.

(7) *Annuities, life, remainder, and reversionary interests.*—Where the donor purchases from a life insurance company or other company issuing annuity contracts, an annuity for the donee, the value of the gift is the cost to the donor, except that where the donor reserves the unconditional right to cause the annuity or the cash value thereof to be payable to himself or his creditors, only such payments as are made to the donee prior to the exercise of the reserved right constitutes gifts. The value of annuities otherwise acquired by the donor and by him assigned or in any manner made payable to the donee annually at the end of each year should be determined by using Table A or Table B, a part of this article. * * *

(8) *Tenancies by the entirety.*— * * *

* * * * *

[There is no subdivision of this article dealing specifically with the valuation of life insurance.]

* * * * *

Treasury Regulations 79, promulgated under the Revenue Act of 1932, **as approved February 26, 1936:**

Art. 2. *Transfers reached.*—The statute imposes a tax whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. * * * In the following examples of transactions resulting in taxable gifts, it will be understood that the transactions occurred after the date of the enactment of the statute (June 6, 1932), and were not for an adequate and full consideration in money or money's worth:

* * * * *

(5) If the insured assigns a life insurance policy, or designates a beneficiary in such a policy, but does not retain what amounts to a power of revocation (as, for example, the right to surrender or cancel the policy, the right to obtain a loan against the policy or its surrender value, or a right to change the beneficiary or assignee, if by the exercise of such latter right the proceeds of the policy might be made payable to the insured, his estate, or otherwise for his benefit), such assignment or designation constitutes a gift, even though the right of the assignee or beneficiary to receive the proceeds is conditioned upon his surviving the insured. For the valuation of policies of life insurance, see subdivision (9) of article 19.

(6) If there is an irrevocable gift of a policy of life insurance and the insured thereafter pays premiums thereon, each premium payment is a gift in the amount thereof.

* * * * *

Art. 19. *Valuation of property.*—(1) *General.*—The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value

of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. The value of a particular kind of property is not to be determined by a forced sale price. Such value is to be determined by ascertaining as a basis the fair market value at the time of the gift of each unit of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the time of the gift should be considered.

(2) *Real estate.*— * * *

[Same as in 1933 edition.]

(3) *Stocks and bonds.*—The value at the date of the gift in the case of stocks and bonds, within the meaning of the statute, is the fair market value per share or bond on such date.

In the case of stocks and bonds listed on a stock exchange the mean between the highest and lowest quoted selling prices on the date of the gift shall be considered as the fair market value per share or bond. * * *

If actual sales or bona fide bid and asked prices are not available, then, in the case of corporate or other bonds, the value is to be arrived at by giving consideration to the soundness of the security, the interest yield, the date of maturity, and other relevant factors, and, in the case of shares of stock, upon the basis of the company's net worth, earning power, dividend-paying capacity, and all other relevant factors having a bearing upon the value of the stock. Complete financial and other data upon which the donor bases his valuation should be submitted with the return.

In cases in which it is established that the value per bond or share of any security determined on the basis of selling or bid and asked prices as herein provided does not reflect the fair market value thereof, then some reasonable modification of such basis or other relevant facts and elements of value shall be considered in determining fair market value.

(4) *Interest in business.*— * * *

[Same as in 1933 edition with immaterial changes in second paragraph.]

(5) *Notes, secured and unsecured.*— * * *

[Same as in 1933 edition.]

(6) *Other property.*—Any property not specifically treated in this article should be valued in accordance with the rule laid down in subdivision (1) hereof.

(7) *Annuities, life, remainder and reversionary interests.*—For valuation of annuities purchased from life insurance companies or other companies issuing annuity contracts, see subdivision (9) of this article.
* * *

(8) *Tenancies by the entirety.*— * * *

(9) *Life insurance and annuity contracts.*—The value of a life insurance contract or of a contract for the payment of an annuity issued by a company regularly engaged in the selling of contracts of that character is established through the sale of the particular contract by the company, or through the sale by the company of comparable contracts. As valuation through sale of comparable contracts is not readily ascertainable when the gift is of a contract which has been in force for some time and on which further premium payments are to be made, the value may be approximated, unless because of the unusual nature of the contract such approximation is not reasonably close to the full value, by adding to the interpolated terminal reserve at the date of the gift the proportionate part of the gross premium last paid before the date of the gift which covers the period extending beyond that date.

The examples given below, so far as relating to life insurance contracts, are of gifts of such contracts on which there are no accrued dividends or outstanding indebtedness.

Example: A donor owning a life insurance policy on which no further payments are to be made to the

company (e.g., a single premium policy or paid-up policy) makes a gift of the contract. The value of the gift is the amount which the company would charge for a single premium contract of the same specified amount on the life of a person of the age of the insured.

* * * * *

STATISTICS.

The statistics printed on the following pages appear in the respective Insurance Year Books for Life Insurance published by the The Spectator Company of Philadelphia, Pennsylvania, for the years 1931-1936, inclusive. The statistics for the year 1935 are compiled from the records of all companies doing ordinary life insurance business in the United States in that year. The statistics for the years 1934-1931, inclusive, include ordinary life insurance business done by industrial companies but those for 1934 and 1933 exclude the figures of the companes indicated. The statistics for the years 1930-1881 inclusive, reported in the year book for 1931, are with respect to all companies reporting to the New York Insurance Department.

AGGREGATES

Year Ending December 31, 1935		Aggregates 275 Ordinary Companies	Aggregates 65 Industrial Companies	Grand Aggregates 340 Companies
LIABILITIES				
Life insurance reserve		11,348,142,516	7,390,164,284	18,738,306,800
Disability and double indemnity reserve		632,563,015	205,953,523	838,516,538
Reserve on supplementary contracts		700,721,641	126,661,365	827,383,006
Unpaid losses and claims		99,589,257	53,603,746	153,193,003
Losses and claims resisted		15,169,514	9,264,726	24,434,240
Dividends to accumulate		298,285,405	40,934,837	339,220,242
Unpaid dividends		18,127,514	8,578,373	26,705,887
Dividends apportioned for 1935		215,706,641	138,201,695	353,908,336
Amounts set apart on deferred dividend policies		10,224,248	13,057,647	23,281,895
Special, voluntary, contingency, etc., reserves		289,866,565	103,789,578	393,656,143
All other liabilities		384,322,702	116,800,600	501,123,302
Total liabilities		14,012,719,018	8,207,010,374	22,219,729,392
Increase in year		920,965,346	500,866,725	1,421,832,071
Unassigned funds and capital		529,932,312	466,833,910	996,766,222
Surplus apportioned		515,797,454	255,048,920	770,846,374
Total surplus funds		1,045,729,766	721,882,830	1,767,612,596
Increase in year		25,237,689	15,819,129	41,056,818
Gross surplus		1,229,906,323	968,001,592	2,197,907,915
NEW BUSINESS		Group Business (53 Companies)	Ordinary Business† (All Companies)	Industrial Business (65 Companies)	Grand Aggregates
New issues	No.	4,453	4,488,366	17,591,266	22,084,085
	Amount	764,889,717	7,584,889,106	4,036,032,266	12,385,811,089
Policies revived	No.	19	297,346	1,939,900	2,237,265
	Amount	62,495,343	464,931,908	469,526,603	996,953,854
Polic. increas	No.	119	8,079	18,382	26,580
	Amount	476,091,838	12,044,340	117,040,196	605,176,374
Dividend additions			51,400,887	99,277,143	150,678,030
Total new issues	No.	4,591	4,793,791	19,549,548	24,347,930
	Amount	1,303,476,898	8,113,266,242	4,721,876,207	14,138,619,347
Increase in year	No.	1,152	−143,038	−1,084,743	−1,226,629
	Amount	211,554,094	200,329,037	−132,920,464	278,962,667
TERMINATIONS					
By death	No.	35	260,630	787,483	1,048,148
	Amount	76,589,130	675,288,364	153,719,925	905,597,419
By maturity	No.		109,530	247,538	357,068
	Amount	8,715	116,862,508	28,814,306	145,685,529
By expiry	No.	328	814,621	1,479,352	2,294,301
	Amount	201,652,871	1,071,674,049	411,848,887	1,685,175,807
By surrender	No.	2	943,705	4,029,541	4,973,248
	Amount	784,283	2,347,591,234	944,983,986	3,293,359,503
By lapse	No.	2,160	1,711,398	11,510,258	13,223,816
	Amount	126,446,782	2,746,155,409	2,534,096,925	5,406,699,116
By change	No.	22	52,873	25,784	78,679
	Amount	24,001,211	460,624,659	12,685,692	497,311,562
By disability	No.		4,183	125	4,308
	Amount	11,123,545	7,660,824	53,303	18,837,672
Total terminations	No.	2,547	3,696,940	18,080,081	21,979,568
	Amount	440,606,537	7,425,857,047	4,086,203,024	11,952,666,608
INSURANCE IN FORCE					
Whole life policies	No.	25,203	21,947,555	45,179,106	67,151,864
	Amount	10,469,576,619	51,287,155,279	10,295,595,391	72,052,327,289
Endowment policies	No.		9,065,732	32,859,374	41,925,106
	Amount		14,800,429,423	6,202,491,616	21,002,921,039
All other policies	No.		2,360,500	5,932,383	8,292,883
	Amount		5,450,178,715	1,232,441,217	6,682,619,932
Dividend additions			425,531,888	567,014,868	992,546,756
Total in force	No.	25,203	33,373,787	83,970,863	117,369,853
	Amount	10,469,576,619	71,963,295,305	18,297,543,092	100,730,415,016
Increase in year	No.	2,044	896,851	1,469,467	2,368,362
	Amount	862,870,361	687,409,195	635,673,183	2,185,952,739
Amount reinsured		24,086,350	1,470,840,864		1,494,927,214

†Includes ordinary business of industrial companies and the United States business of foreign companies.

AGGREGATES

Year Ending December 31, 1934			Aggregates 248 Ordinary Companies	Aggregates 65 Industrial Companies	Grand Aggregates 313 Companies
Liabilities					
Life insurance reserve			$10,634,829,637	$6,929,776,270	$17,564,605,907
Disability and double indemnity reserve			205,135,313	94,341,928	299,477,241
Reserve on supplementary contracts			970,570,972	195,079,239	1,165,650,211
Unpaid losses and claims			100,532,160	53,950,005	154,482,165
Losses and claims resisted			15,585,277	9,017,197	24,602,474
Dividends to accumulate			277,498,172	37,487,997	314,986,169
Unpaid dividends			20,293,929	8,728,256	29,022,185
Dividends apportioned for 1935			229,123,048	140,177,462	369,300,510
Amounts set apart on deferred dividend policies			11,062,809	15,716,589	26,779,398
Special, voluntary, contingency, etc., reserves			283,562,083	112,723,139	396,285,222
All other liabilities			359,799,173	108,492,809	468,291,982
Total liabilities			13,107,992,573	7,705,490,891	20,813,483,464
Increase in year			533,661,501	344,633,677	878,295,178
Unassigned funds and capital			513,266,197	517,044,208	1,030,310,405
Surplus apportioned			523,747,940	268,617,190	792,365,130
Total surplus funds			1,037,014,137	785,661,398	1,822,675,535
Increase in year			−22,026,006	19,662,624	−2,363,382
Gross surplus			1,216,897,260	1,005,087,674	2,221,984,934
New Business		Group Business (53 Companies)	Ordinary Business† (All Companies)	Industrial Business (65 Companies)	
New issues	No.	3,475	4,662,683	18,067,594	22,733,752
	Amount	571,395,246	7,721,594,771	4,045,485,102	12,338,475,119
Policies revived	No.	45	331,002	2,617,593	2,948,640
	Amount	16,419,311	532,525,522	633,750,568	1,182,695,401
Polic. increas	No.	6	4,537	26,059	30,602
	Amount	494,654,080	7,420,736	96,163,720	598,238,536
Dividend additions			51,198,192	109,472,810	160,671,002
Total new issues	No.	3,526	4,998,222	20,711,246	25,712,994
	Amount	1,082,468,637	8,312,739,221	4,884,872,200	14,280,080,058
Increase in year	No.	1,080	188,547	643,105	832,732
	Amount	575,854,449	299,412,843	180,586,491	1,055,853,783
Terminations					
By death	No.	67	257,770	796,030	1,053,867
	Amount	71,576,430	684,509,431	153,570,202	909,656,063
By maturity	No.		100,998	194,171	295,169
	Amount	6,130	109,621,103	20,569,523	130,196,756
By expiry	No.	458	854,634	382,524	1,237,616
	Amount	150,711,183	1,338,822,657	127,339,900	1,616,873,740
By surrender	No.	6	1,243,084	4,264,683	5,507,773
	Amount	2,201,310	3,203,668,491	983,691,019	4,189,560,820
By lapse	No.	9,913	1,744,882	14,339,303	16,094,098
	Amount	148,354,461	2,933,956,861	3,127,573,734	6,209,885,056
By change	No.	3	13,074	639	13,716
	Amount	18,845,103	572,668,856	15,190,036	606,703,995
By disability	No.	17	4,473	429	4,919
	Amount	11,436,486	24,910,737	128,494	36,475,717
Total terminations	No.	10,464	4,218,915	19,977,779	24,207,158
	Amount	403,131,103	8,868,158,136	4,428,062,908	13,699,352,147
Insurance in Force					
Whole life policies	No.	20,324	21,111,404	43,368,132	64,499,860
	Amount	9,593,022,369	50,607,696,494	9,666,316,848	69,867,035,711
Endowment policies	No.		8,925,976	33,430,120	42,356,096
	Amount		14,497,076,773	6,212,149,313	20,709,226,086
All other policies	No.		2,585,026	5,781,141	8,366,167
	Amount		5,771,822,506	1,216,862,475	6,988,184,981
Dividend additions			422,084,381	555,879,887	977,964,368
Total in force	No.	20,324	32,622,406	82,579,393	115,222,123
	Amount	9,593,022,369	71,298,680,254	17,650,708,523	98,542,411,146
Increase in year	No.	−6,938	779,307	733,467	1,505,836
	Amount	679,337,534	−555,418,915	456,809,292	580,727,911
Amount reinsured		19,427,865	1,570,527,676		1,589,955,541

†Includes ordinary business of industrial companies. All aggregate items above exclude figures of Continental Life, St. Louis; Federal Union Life, Cincinnati; Brooklyn National Life, Brooklyn, N. Y.; Detroit Life, Detroit and the United States business of foreign companies.

AGGREGATES

Year Ending December 31, 1933		Group Business*	Ordinary Business†	Industrial Business	
			Aggregates 252 Ordinary Companies	Aggregates 66 Industrial Companies	Grand Aggregate 318 Companies
LIABILITIES					
Reserves			$10,366,960,132	$6,719,623,954	$17,086,584,086
Reserve on supplementary contracts			824,110,993	165,821,358	989,932,351
Unpaid losses and claims			107,716,349	54,729,123	162,445,472
Losses and claims resisted			15,081,206	10,011,188	25,092,394
Dividends to accumulate			269,594,086	35,209,580	304,803,646
Unpaid dividends			23,338,099	8,788,263	32,126,362
Dividends apportioned for 1934			240,578,014	139,448,239	380,026,253
Amounts set apart on deferred dividend policies			8,653,134	17,436,177	26,089,311
Special, voluntary, contingency, etc., reserves			306,948,044	103,087,982	410,036,026
All other liabilities			362,249,664	105,942,928	468,192,592
Total liabilities			12,525,229,701	7,360,098,792	19,885,328,493
Increase in year			300,897,584	169,414,146	470,311,730
Unassigned funds and capital			507,365,865	502,987,768	1,010,353,633
Surplus apportioned			556,179,192	259,972,398	816,151,590
Total surplus funds			1,063,545,057	762,960,166	1,826,505,223
Increase in year			−62,054,367	−19,198,540	−81,252,907
Gross surplus			1,201,387,093	926,974,221	2,128,361,314
NEW BUSINESS					
New issues	Policies	3,692	4,553,622	16,328,261	20,885,575
	Amount	746,700,148	7,644,311,769	3,635,085,981	12,026,097,898
Insurance revived	Policies	73	347,019	3,407,941	3,755,033
	Amount	3,931,318	592,473,533	839,968,199	1,436,373,050
Insurance increased	Policies		3,353	99,805	103,158
	Amount	70,802,880	3,341,025	59,371,794	133,515,699
Dividend additions			52,398,585	138,472,227	190,870,812
Total new issues	Policies	3,765	4,903,994	19,836,007	24,743,766
	Amount	821,434,346	8,292,524,912	4,672,898,201	13,786,857,459
Increase in year	Policies	−1,735	262,351	16,427	277,043
	Amount	−247,722,028	−430,612,196	−121,719,800	−800,054,024
TERMINATIONS					
By death	No.	109	251,712	772,539	1,024,360
	Amount	64,825,103	697,532,406	148,863,402	911,220,911
By maturity	No.		97,149	128,145	225,294
	Amount	6,017	107,501,709	13,082,513	120,590,239
By expiry	No.	526	909,376	274,742	1,184,644
	Amount	262,843,824	1,578,603,337	92,617,099	1,934,064,260
By surrender	No.	7	1,585,167	5,213,783	6,798,957
	Amount	1,693,494	4,394,233,139	1,147,971,822	5,543,898,455
By lapse	No.	3,627	2,022,925	14,965,306	16,991,858
	Amount	201,199,753	3,816,833,267	3,367,034,763	7,385,067,783
By change	No.	238	13,322	12,636	26,196
	Amount	159,542,427	815,073,764	27,216,535	1,001,832,726
By disability	No.	12	4,784	308	5,104
	Amount	16,434,947	9,938,787	121,059	26,494,793
Total terminations	No.	4,519	4,884,435	21,367,459	26,256,413
	Amount	706,545,565	11,419,716,409	4,796,907,193	16,923,169,167
INSURANCE IN FORCE					
Whole life insurance	No.		20,851,376	41,432,736	62,284,112
	Amount		51,372,261,692	9,050,891,078	60,423,152,770
Endowment insurance	No.		8,556,155	33,974,096	42,530,251
	Amount		14,017,586,823	6,217,824,800	20,235,411,623
All other insurance	No.	27,284	2,517,375	6,110,572	8,655,231
	Amount	8,911,741,717	6,100,408,182	1,344,966,135	16,357,116,034
Reversionary additions			428,572,485	540,790,835	969,363,320
Total in force	No.	27,284	31,924,906	81,517,404	113,469,594
	Amount	8,911,741,717	71,918,829,182	17,154,472,848	97,985,043,747
Increase in year	No.	−754	19,559	−1,531,452	−1,512,647
	Amount	114,888,781	−3,127,191,497	−124,008,992	−3,136,311,708
MISCELLANEOUS					
Mean ledger assets			12,257,971,104	7,551,307,304	19,809,278,408
Mean admitted assets			12,928,965,166	7,772,792,734	20,701,757,900
Invested assets			12,246,884,313	7,503,956,050	19,750,840,363
Interest and rents earned			572,815,609	363,235,621	936,051,230
Net assets over all liabilities except reserves			11,430,547,320	7,482,586,122	18,913,133,442
Mean reserves			10,283,115,891	6,630,121,538	16,913,237,429
Mean insurance in force		8,854,297,327	73,482,424,931	17,216,477,144	99,553,199,402
Death claims pd. plus net exps. of management			864,106,733	639,659,334	1,503,766,067
7½ per cent of renewal premiums			111,594,338	99,634,427	211,228,765

*Includes business of 54 companies. †Includes ordinary business of industrial companies. All aggregate figures exclude the business of the California-Western States Life, Continental Life, St. Louis, Mo., and the Detroit Life, Detroit.

AGGREGATES

Year Ending December 31, 1932		Group Business*	Ordinary Business†	Industrial Business	Aggregates 260 Ordinary Companies	Aggregates 68 Industrial Companies	Grand Aggregates 328 Companies
LIABILITIES							
Reserves					$10,460,628,178	$6,544,865,563	$17,005,493,741
Reserve on supplementary contracts					697,505,443	136,178,688	833,684,131
Unpaid losses and claims					102,844,645	54,501,003	157,345,648
Losses and claims resisted					13,366,998	8,064,242	21,431,240
Dividends to accumulate					252,110,633	34,143,122	286,253,755
Unpaid dividends					26,151,572	10,311,951	36,463,523
Dividends apportioned for 1933					308,902,516	149,656,589	458,559,105
Amounts set apart on deferred dividend policies					21,503,608	17,905,358	39,408,966
Special, voluntary, contingency, etc., reserves					353,003,133	112,825,873	465,829,006
All other liabilities					349,854,265	119,623,527	469,477,792
Total liabilities					12,585,870,991	7,188,075,916	19,773,946,907
Increase in year					360,319,735	270,676,745	630,996,480
Unassigned funds and capital					486,565,299	493,492,934	980,058,233
Surplus apportioned					683,409,257	280,387,820	963,797,077
Total surplus funds					1,169,974,556	773,880,754	1,943,855,310
Increase in year					29,348,806	94,678,570	124,027,376
Gross surplus					1,238,694,247	852,721,866	2,091,416,113
NEW BUSINESS							
New issues	Policies	4,215	4,350,608	15,852,002			20,206,825
	Amount	743,825,052	8,196,424,718	3,689,806,499			12,630,056,269
Insurance revived	Policies	56	364,378	3,766,717			4,131,151
	Amount	5,786,117	642,300,254	924,051,523			1,572,137,894
Insurance increased	Policies	14	6,196	152,459			158,669
	Amount	60,761,693	7,286,345	39,268,998			107,317,036
Dividend additions			65,071,880	139,701,348			204,773,228
Total new issues	Policies	4,285	4,721,182	19,771,178			24,496,645
	Amount	810,372,862	8,911,083,197	4,792,828,368			14,514,284,427
Increase in year	Policies	952	−479,153	−140,300			−337,901
	Amount	−234,292,157	−2,315,240,462	−82,232,498			−2,631,765,117
TERMINATIONS							
By death	No.	151	257,036	803,474			1,060,661
	Amount	71,177,342	723,375,305	153,755,277			948,307,924
By maturity	No.		96,835	130,768			227,603
	Amount		110,118,430	13,058,611			123,177,041
By expiry	No.	716	827,608	266,289			1,094,613
	Amount	198,543,149	1,376,216,477	82,104,200			1,656,863,826
By surrender	No.	96	1,559,377	6,440,351			7,999,824
	Amount	2,081,723	4,430,227,932	1,261,672,239			5,693,981,894
By lapse	No.	2,997	2,395,316	17,445,461			19,843,774
	Amount	344,236,336	4,929,965,659	4,187,937,485			9,462,139,480
By change	No.	23	15,639	5,286			20,948
	Amount	992,686,668	722,923,440	112,290,800			1,827,900,908
By disability	No.		4,502	343			4,845
	Amount	17,706,711	10,167,494	136,855			28,011,060
Total terminations	No.	3,983	5,156,313	25,091,972			30,252,268
	Amount	1,626,431,929	12,302,994,737	5,810,955,467			19,740,382,133
INSURANCE IN FORCE							
Whole life insurance	No.		21,613,632	40,931,325			62,544,957
	Amount		52,163,439,717	8,854,681,335			61,018,121,052
Endowment insurance	No.		8,646,682	35,912,027			44,558,709
	Amount		14,502,690,271	6,524,429,058			21,027,119,329
All other insurance	No.	29,713	2,527,937	6,101,306			8,658,956
	Amount	9,108,742,326	6,668,905,411	1,375,468,108			17,153,115,845
Reversionary additions			445,205,026	510,811,280			956,016,306
Total in force	No.	29,713	32,788,251	82,944,658			115,762,622
	Amount	9,108,742,326	73,780,240,425	17,265,389,781			100,154,372,532
Increase in year	No.	302	−435,131	−5,320,794			−5,755,623
	Amount	−816,059,067	−3,391,911,540	−1,018,127,099			−5,226,097,706
MISCELLANEOUS							
Mean ledger assets			12,195,260,365	7,277,641,661			19,472,902,026
Mean admitted assets			12,868,026,456	7,536,321,751			20,404,348,217
Invested assets			12,292,363,593	7,354,938,778			19,647,302,371
Interest and rents earned			615,002,172	370,007,736			985,009,908
Net assets over all liabilities except reserves			11,630,621,163	7,318,834,856			18,949,456,019
Mean reserves			10,341,441,841	6,464,670,434			16,806,112,275
Mean insurance in force		9,516,771,859	75,476,196,195	17,774,453,330			102,767,421,384
Death claims pd. plus net exps. of manage't			929,599,768	643,285,913			1,572,885,681
7½ per cent of renewal premiums			122,110,848	104,696,194			226,807,042

*Includes business of 53 companies.
†Includes ordinary business of industrial companies.

AGGREGATES—Continued

Year Ending December 31, 1931		Group Business b	Ordinary Business a	Industrial Business	Aggregates 274 Ordinary Companies	Aggregates 68 Industrial Companies	Grand Aggregates 342 Companies
LIABILITIES							
Reserves					$10,327,160,357	$6,395,683,594	$16,722,843,951
Reserve on supplementary contracts					554,981,043	106,637,523	661,618,566
Unpaid losses and claims					101,665,867	51,787,907	153,453,774
Losses and claims resisted					11,496,819	5,305,338	16,802,157
Dividends to accumulate					245,266,169	32,606,163	277,872,332
Unpaid dividends					28,256,437	10,328,087	38,584,524
Dividends apportioned					327,469,902	120,543,383	448,013,285
Amounts set apart					279,753,620	86,449,994	366,203,614
All other liabilities					319,061,156	111,426,268	430,487,424
Total liabilities					12,195,111,370	6,920,768,257	19,115,879,627
Increase in year					788,646,665	510,694,301	1,299,340,966
Unassigned funds and capital					574,232,560	469,827,643	1,044,060,203
Surplus apportioned					607,223,522	206,993,377	814,216,899
Total surplus funds					1,181,456,082	676,821,020	1,858,277,102
Increase in year					−14,324,450	64,465,634	50,141,184
Gross surplus					1,256,381,634	716,143,156	1,972,524,790
NEW BUSINESS		Group Business b	Ordinary Business a	Industrial Business			
New Issues	Policies	3,788	4,942,794	16,557,037			21,503,619
	Amount	973,505,571	10,680,728,810	3,986,673,813			15,640,908,194
Policies revived	Policies	133	302,464	2,855,764			3,158,361
	Amount	10,973,940	574,924,529	683,595,734			1,269,494,203
Policies increased	Policies	16	6,971	57,902			64,889
	Amount	73,234,651	20,936,868	32,584,560			126,756,079
Dividend additions			44,840,202	144,249,749			189,089,951
Total new issues	Policies	3,937	5,252,229	19,470,703			24,726,869
	Amount	1,057,714,162	11,321,430,409	4,847,103,856			17,226,248,427
Increase in year	Policies	−13,933	10,932	470,026			467,025
	Amount	−491,570,150	−1,039,394,523	−38,440,105			−1,569,404,778
TERMINATIONS							
By death	No.	20	253,520	842,919			1,096,459
	Amount	73,827,618	732,127,630	159,079,409			965,034,657
By maturity	No.		90,744	125,812			216,556
	Amount		106,835,526	12,875,499			119,711,025
By expiry	No.	504	699,092	219,964			919,560
	Amount	167,772,348	1,068,016,977	79,614,928			1,315,404,253
By surrender	No.	1	1,026,912	4,381,041			5,407,954
	Amount	810,978	2,886,157,738	824,936,623			3,711,905,339
By lapse	No.	6,633	2,226,319	14,927,306			17,160,258
	Amount	252,065,216	4,770,695,621	3,586,846,221			8,609,607,058
By change	No.	48	22,743	9,981			32,772
	Amount	465,640,280	542,544,391	117,406,765			1,125,591,436
By disability	No.	9	3,098	154			3,261
	Amount	16,436,478	7,065,013	109,351			23,610,842
Total terminations	No.	7,215	4,322,428	20,507,177			24,836,820
	Amount	976,552,918	10,113,442,896	4,780,868,796			15,870,864,610
INSURANCE IN FORCE							
Whole life policies	No.		22,205,961	43,940,024			66,145,985
	Amount		58,049,120,087	9,489,375,967			67,538,496,054
Endowment policies	No.		8,769,910	39,443,077			48,212,987
	Amount		14,918,838,964	7,223,715,797			22,142,554,761
All other policies	No.	33,174	2,523,087	4,845,303			7,401,564
	Amount	9,954,011,233	7,235,754,108	1,048,301,210			18,238,066,551
Reversionary additions			453,406,286	513,039,242			966,445,528
Total in force	No.	33,174	33,498,058	88,228,404			121,760,536
	Amount	9,954,011,233	80,657,119,445	18,274,432,216			108,885,562,894
Increase in year	No.	−3,278	923,616	−1,043,038			−122,700
	Amount	81,161,244	1,188,702,930	40,807,162			1,310,671,336
MISCELLANEOUS							
Mean ledger assets					11,724,093,923	6,855,056,694	18,579,150,617
Mean admitted assets					12,377,290,222	7,116,040,269	19,493,330,491
Invested assets					12,027,449,199	6,989,784,130	19,017,233,329
Interest and rents earned					595,389,396	357,004,177	952,393,573
Net assets over all liabilities except reserve					11,508,616,439	7,072,504,614	18,581,121,053
Mean reserves					10,066,393,531	6,184,792,788	16,251,186,319
Mean insurance in force		9,913,430,611			80,062,767,980	18,254,028,635	108,230,227,226
Death claims paid plus net expenses of manage't					971,245,905	663,051,642	1,634,297,547
7½ per cent of renewal premiums					127,905,172	105,778,374	233,683,546

a Includes ordinary business of industrial companies. b 56 companies.

POLICIES ISSUED

The following table shows the number and amount of policies issued and terminated
Insurance Department for fifty

Number of Companies	Year.	Total Number and Amount of Policies Issued and Terminated During the Year.				Mode of			
		Issued.		Terminated.		By Death.		By Maturity.	
		No.	Amount.	No.	Amount.	No.	Amount.	No.	Amount.
			$		$		$		$
48	1930	3,5[illegible]515	9,052,831,036	2417,394	5,976,383,827	190,249	567,864,826	77,538	87,527,377
45	1929	3,483,453	9,398,670,452	1999,821	4,944,973,044	184,613	520,912,161	74,718	84,009,213
45	1928	3,164,124	8,754,803,066	1728,360	4,372,052,508	165,740	458,212,212	63,663	69,688,956
45	1927	2,810,421	8,379,677,138	1674,722	4,309,552,844	148,248	397,381,566	61,818	68,864,299
41	1926	2,703,461	8,190,635,687	1461,902	3,691,895,767	143,978	366,586,587	72,643	79,058,356
41	1925	2,602,016	7,788,946,988	1297,829	3,161,293,782	130,826	318,523,157	85,426	95,395,793
38	1924	2,383,128	7,233,738,396	1340,040	3,025,408,431	120,087	317,343,467	98,438	118,272,957
37	1923	2,352,193	6,694,734,061	1164,767	2,614,068,121	116,676	294,761,013	95,605	122,253,428
37	1922	2,038,174	5,518,884,893	1196,543	2,724,917,999	108,123	266,938,672	85,737	118,580,601
37	1921	2,012,101	4,902,264,045	1178,350	2,611,389,591	100,831	240,210,417	77,524	109,489,602
37	1920	2,420,237	6,068,203,071	821,058	1,648,322,045	104,912	247,113,527	67,615	104,157,287
37	1919	2,133,688	5,199,839,061	682,648	1,273,386,917	106,303	235,390,874	59,517	95,536,989
37	1918	1,335,232	2,965,540,539	655,443	1,226,644,847	132,367	272,124,741	46,006	76,401,216
35	1917	1,377,904	2,892,879,648	612,565	1,134,327,845	85,048	188,805,687	40,039	72,180,474
35	1916	1,256,601	2,362,193,027	654,314	1,187,707,886	82,510	189,618,585	33,983	60,092,490
35	1915	1,089,870	1,928,288,981	655,269	1,251,717,391	77,881	178,871,434	32,052	60,398,780
35	1914	1,012,653	1,808,730,481	315,213	1,180,469,592	70,428	160,807,515	30,071	57,395,737
34	1913	1,015,788	1,840,577,945	564,578	1,043,413,871	60,442	152,764,980	26,568	52,083,622
34	1912	897,927	1,702,146,572	516,721	977,814,555	66,546	155,161,286	24,989	50,148,773
34	1911	811,964	1,577,846,251	466,069	881,297,485	63,133	145,297,139	21,849	44,463,188
33	1910	747,028	1,362,589,920	425,925	802,653,838	58,711	139,333,482	21,026	44,479,327
35	1909	694,965	1,284,242,047	424,249	821,024,943	55,714	132,547,751	17,681	39,709,534
35	1908	592,390	1,090,979,168	439,760	859,370,136	53,319	126,668,925	15,506	34,615,410
37	1907	569,054	997,261,978	446,366	844,939,573	53,187	127,183,303	14,274	32,066,455
43	1906	715,093	1,229,908,694	582,764	1,093,639,643	52,252	123,870,774	13,098	29,971,901
43	1905	1,017,717	1,733,101,511	657,159	1,196,501,744	50,290	123,952,831	12,263	28,201,579
42	1904	1,101,113	1,884,826,365	580,225	1,097,952,978	47,701	118,730,326	11,720	27,428,642
42	1903	976,191	1,759,681,523	501,425	958,746,760	42,863	108,804,846	11,353	26,817,302
39	1902	907,171	1,646,013,18[illegible]	461,225	900,684,393	38,763	97,246,596	10,296	24,179,262
38	1901	787,747	1,470,317,88[illegible]	392,066	828,302,164	35,991	93,877,539	9,143	22,532,079
40	1900	687,005	1,356,769,653	57,175	764,961,374	32,163	83,993,328	7,561	18,498,477
37	1899	632,704	1,304,306,028	5,002	711,131,389	29,232	80,487,308	6,783	15,388,740
36	18[illegible]	485,735	1,018,366,027	7,896	668,082,615	25,644	69,356,122	5,801	14,020,954
35	1897	431,457	923,804,876	262,402	656,100,517	23,851	67,006,268	5,601	12,601,171
35	1896	350,106	796,124,326	258,465	660,728,006	22,603	65,074,964	5,654	12,439,998
34	1895	366,565	864,815,534	251,879	652,904,487	21,574	62,023,805	5,129	10,565,448
32	1894	396,843	985,520,033	294,624	837,639,223	19,912	58,411,242	4,316	8,228,407
31	1893	404,236	1,058,659,846	265,080	746,332,432	19,746	58,620,804	4,776	8,763,098
30	1892	353,083	952,884,380	210,089	626,585,700	18,860	56,164,456	4,226	8,062,702
30	1891	327,260	932,705,515	194,112	598,860,801	17,912	47,867,934	4,745	8,606,591
31	1890	288,281	883,787,019	153,706	483,734,206	15,526	44,903,130	5,396	8,720,877
31	1889	250,577	787,665,283	131,390	403,479,167	13,467	39,061,217	4,876	8,303,958
29	1888	204,365	631,731,701	112,587	344,677,818	12,867	37,358,160	4,681	8,661,216
29	1887	174,675	531,170,783	93,303	279,089,399	11,673	32,733,282	4,100	7,033,244
29	1886	151,102	448,514,242	83,976	244,043,226	10,497	29,234,271	4,192	6,931,844
29	1885	156,214	378,214,523	92,236	225,442,556	10,245	28,194,990	4,760	7,870,201
29	1884	127,965	321,310,170	83,055	214,312,127	9,183	24,871,825	4,781	8,552,301
29	1883	110,302	308,064,893	66,200	181,917,654	9,092	24,689,107	4,464	10,708,207
30	1882	91,945	257,517,216	57,872	159,958,024	8,281	22,495,101	3,570	7,697,308
30	1881	80,929	222,582,483	55,351	146,983,650	8,268	22,565,252	4,254	7,688,222

AND TERMINATED†

together with the mode of termination, in all companies reporting to the New York years ending January 1, 1931:

Termination.										
By Expiry.		By Surrender.		By Lapse.		By Change and Decrease.		Not Taken.		Year
No.	Amount.	No.	Amount.	No.	Amount.	No.	Amount.	No.	Amount.	
	$		$		$		$		$	
485,609	712,076,961	567,716	1,691,780,044	1,089,808	2,598,620,757	4,300	313,353,769	§2,174	§5,160,093	1930
400,328	591,974,397	453,913	1,357,266,595	881,919	2,154,999,133	3,639	232,237,959	§1,591	§3,483,586	1929
330,407	516,282,948	400,072	1,125,565,550	762,435	1,964,302,505	4,587	234,541,818	§1,456	§3,458,517	1928
288,187	450,577,887	398,338	1,064,184,909	772,422	2,052,660,094	4,334	272,897,986	§1,375	§2,986,103	1927
248,171	412,446,276	325,580	860,584,175	653,308	1,714,821,927	16,995	255,868,283	§1,227	§2,530,163	1926
212,356	382,497,650	295,654	748,139,586	563,748	1,415,014,342	8,632	199,247,189	§1,187	§2,476,065	1925
213,037	395,863,926	274,952	697,930,540	596,825	1,414,901,762	36,701	81,095,779	.....	.....	1924
125,369	313,010,253	259,425	639,069,095	518,231	1,154,569,325	40,457	90,405,007	.....	.....	1923
126,147	306,542,924	254,683	613,563,184	569,714	1,226,094,007	52,139	193,198,611	.....	.....	1922
119,470	278,663,926	191,141	440,616,139	676,026	1,403,796,369	13,358	138,613,138	.....	.....	1921
87,168	186,894,018	146,958	330,146,683	411,539	749,985,625	2,866	30,024,905	.....	.....	1920
78,950	147,888,238	132,615	318,621,289	302,009	475,949,527	3,254	.....	.....	.....	1919
76,545	146,959,172	125,533	273,628,097	272,187	450,681,843	2,805	6,849,778	.....	.....	1918
84,873	143,853,166	137,063	292,918,439	250,615	399,488,158	14,927	37,081,921	.....	.....	1917
132,729	172,901,149	157,783	341,749,214	244,379	381,328,030	2,930	42,018,368	.....	.....	1916
98,850	152,812,473	184,962	387,690,847	260,474	430,697,233	1,050	41,246,624	.....	.....	1915
81,501	128,575,779	174,917	362,744,883	257,445	432,203,556	849	38,742,122	.....	.....	1914
69,696	106,246,598	172,823	339,861,747	225,051	363,606,021	999	28,850,903	.....	.....	1913
60,195	91,028,102	147,731	276,616,429	211,609	366,276,434	5,651	58,583,531	.....	.....	1912
58,209	87,154,465	131,954	252,331,184	190,307	325,728,487	617	26,322,922	.....	.....	1911
49,726	77,433,441	118,613	236,729,678	177,392	277,196,939	457	27,480,971	.....	.....	1910
44,873	78,137,054	124,807	250,031,205	180,748	270,909,576	426	49,689,823	.....	.....	1909
44,216	88,001,867	116,485	250,607,618	209,558	314,945,581	676	44,530,735	.....	.....	1908
64,448	123,661,460	102,510	213,551,282	211,299	307,688,580	648	40,788,493	.....	.....	1907
102,074	183,197,550	107,711	234,086,670	306,421	454,634,793	1,208	67,877,955	.....	.....	1906
94,203	171,800,963	82,636	191,416,929	315,854	452,759,500	4,926	57,538,123	96,987	170,831,828	1905
79,096	144,173,299	63,519	151,214,509	275,784	422,366,968	9,517	54,332,030	92,888	179,707,204	1904
67,418	127,621,935	53,304	128,379,968	236,942	352,843,070	6,618	41,486,167	82,927	172,793,472	1903
54,266	107,851,551	46,193	110,417,008	215,253	334,420,876	19,970	71,055,269	76,484	155,513,831	1902
39,428	88,966,675	43,626	99,305,385	181,743	299,712,956	15,034	55,375,979	67,101	168,531,551	1901
27,716	68,264,360	37,878	89,436,052	186,871	335,423,323	11,055	42,366,595	53,931	126,979,299	1900
9,790	31,533,428	42,555	105,462,261	158,878	285,204,282	12,345	51,569,153	55,419	141,486,217	1899
8,581	27,870,448	41,640	105,048,285	152,219	289,118,285	5,850	39,294,267	48,161	123,374,254	1898
9,040	29,120,890	52,222	131,457,523	128,716	274,288,306	4,579	38,683,029	38,393	102,943,330	1897
8,394	27,688,207	51,380	136,630,809	132,278	288,107,830	4,465	41,290,711	33,691	89,525,487	1896
9,931	31,003,172	49,693	135,022,326	129,236	282,768,964	2,803	35,322,988	33,513	96,197,784	1895
8,824	29,740,618	46,560	136,091,827	140,128	334,048,737	3,757	36,791,854	71,127	234,326,538	1894
7,603	24,565,100	35,791	111,426,382	115,785	291,505,212	2,211	32,796,096	79,174	216,655,040	1893
5,932	19,690,292	28,830	92,708,018	96,803	263,566,267	2,087	21,132,219	53,351	165,261,746	1892
6,191	19,808,218	22,438	69,788,927	89,515	257,985,176	1,894	16,512,449	51,417	178,291,506	1891
6,168	20,564,140	20,791	67,345,214	61,843	172,489,224	1,477	11,825,869	42,505	157,885,752	1890
4,899	16,413,832	17,580	56,910,405	52,932	139,280,352	1,736	10,259,467	35,900	133,249,876	1889
3,923	13,895,489	16,388	54,153,514	45,114	121,013,284	1,407	8,139,763	28,207	101,436,392	1888
2,943	10,482,461	14,451	48,356,157	35,902	91,400,252	1,298	7,131,811	22,936	81,982,192	1887
2,857	10,429,692	13,965	45,035,331	31,620	80,895,034	1,348	6,310,241	19,497	65,206,763	1886
2,624	9,033,500	13,724	43,882,293	44,189	79,268,220	1,228	5,794,576	15,466	51,398,776	1885
2,466	8,334,126	12,524	42,103,980	36,886	77,850,963	1,233	5,175,195	15,982	47,423,737	1884
1,767	3,891,670	10,909	36,708,240	24,862	57,236,963	1,080	8,782,783	13,126	39,900,684	1883
2,607	5,647,485	10,380	38,120,541	20,478	48,678,171	2,018	7,129,592	10,538	30,189,826	1882
2,340	5,770,641	10,139	33,046,732	18,364	41,809,149	2,107	7,597,291	9,879	28,506,363	1881

†Industrial and group insurance are omitted. § By disability.

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 486

MADELINE D. POWERS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Although we believe that the decision below is correct, we do not oppose the petition in view of the conflict with decisions in three other circuits[1] which the court below recognized (R. 43–44) and in view of the fact that certiorari was granted on October 14, 1940, in *Guggenheim* v. *Rasquin*, No. 92, which involves the same question.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

OCTOBER 1940.

[1] *Commissioner* v. *Haines*, 104 F. (2d) 854 (C. C. A. 3d); *Helvering* v. *Cronin*, 106 F. (2d) 907 (C. C. A. 8th); *Helvering* v. *Bryan*, 109 F. (2d) 430 (C. C. A. 4th).

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 15–19) is unreported. The opinion of the United States Circuit Court of Appeals for the First Circuit (R. 41–48) is not yet reported.

JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered July 16, 1940 (R. 48). The petition for a writ of certiorari was filed on October 7, 1940, and was granted on November 12, 1940. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where single-premium policies of life insurance are irrevocably assigned shortly after issuance, is the value thereof for gift tax purposes the cost to the donor or the cash surrender value of the policies?

STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the statutes and regulations appear in the Appendix to the Government's brief in *Guggenheim* v. *Rasquin*, No. 92, to be argued immediately preceding the present case.

STATEMENT

The pertinent facts as found by the Board of Tax Appeals are as follows (R. 16–19):

During the period from November 25, to December 5, 1935, inclusive, Madeleine D. Powers, the taxpayer here, purchased six single-premium policies of insurance as follows (R. 16):

Company and policy number	Date of issue of policy	Name of insured	Face amount of policy	Amount of single premium paid
The Fidelity Mutual Life Ins. Co. No. 532838.	11/25/35	Madeleine D. Powers..	$20,000	$13,967.40
The Prudential Ins. Co. of America No. 9114410.	12/ 4/35	Madeleine D. Powers..	100,000	68,779.00
The Mutual Life Ins. Co. of N. Y. No. 5090777.	11/25/35	Madeleine D. Powers..	40,000	27,204.80
The Prudential Ins. Co. of America No. 9114963.	12/ 5/35	Madeleine Powers.....	122,000	99,672.78
The Connecticut Mutual Life Ins. Co. No. 887777.	11/27/35	Madeleine Powers.....	28,000	22,671.60
Home Life Ins. Co. No. 435395.....	11/27/35	Madeleine Powers.....	50,000	40,854.00

At the end of December 1935, the taxpayer made gifts of these policies which then had a cash surrender value and reserve carried against them as follows (R. 17):

Company and policy number	Date of gift	Cash surrender value on date of gift	Reserve carried by Ins. Co. at date of gift
The Fidelity Mutual Life Ins. Co., No. 532838	12/30/35	$12,360.00	$12,672.02
The Prudential Ins. Co. of America, No. 9114410	12/30/35	56,198.86	60,917.84
The Mutual Life Ins. Co. of N. Y., No. 5090777	12/30/35	* 23,271.30	25,344.05
The Prudential Ins. Co. of America, No. 9114963	12/30/35	84,067.70	89,383.33
The Connecticut Mutual Life Ins. Co., No. 887777	12/30/35	20,790.73	21,126.73
Home Life Ins. Co., No. 435395	12/31/35	36,671.71	37,728.33

* Cash surrender value when right to surrender first arose, discounted to date of gift.

The policies in which taxpayer was named as the insured were payable at the outset to taxpayer's husband, George H. Powers, if living, and the policies in which her daughter, Madeleine Powers, was named as the insured were payable to taxpayer if living, otherwise to the insured, the estate of the insured, or the estate of taxpayer. Taxpayer retained the right to change the beneficiaries of the policies in which she was named as the insured. The gifts were in the form of irrevocable assignments to taxpayer's husband and the Massachusetts Hospital Life Insurance Company, as trustees (R. 17).

During the period from November 25 to December 31, 1935, there was not a sufficient change in the age of the insured in any of the policies to require, for the issuance of like policies during that period, the payment of larger single premiums than those

paid by the taxpayer. At the respective dates of gift there were no accumulated dividends apportioned or credited to any of the policies, provisionally or otherwise, and no paid-up additions to the policies (R. 17).

In the case of a single premium policy, the cash surrender value during the first year in which the policy is outstanding is always less than the reserve. The cash surrender value is the reserve for the policy less a surrender charge, and varies with the different companies and policy years. The surrender charge and premiums actually paid in the particular year account for the difference between the reserve and cash surrender value on a particular policy. The discouragement of surrenders is one of the reasons for the surrender charge. Part of the surrender charge is placed in a contingency reserve to meet adverse mortality and interest expense over a period of years (R. 17–18).

The premium exceeds the reserve at the outset by the amount of expenses which include commissions, taxes, medical fees, cost of issuing the policy and placing it on the books, and the inspection fee (R. 18).

With respect to Prudential Policy No. 9114410, interpolating between the initial reserve of $60,833 for $100,000 of insurance at the age of 57 and $62,024, the terminal reserve at the age of 58, the total interpolated reserve as of December 30, 1935, 26 days after the issuance of the policy, was

$60,917.84. The single premium charged at the outset, $68,779, included the amount necessary to maintain the company's reserves, plus all costs of management and commissions, commonly called loading charges. On the date of gift, none of the companies in this case would have paid to the owner of the policy the amount of the reserve against the policy. The Prudential Insurance Company of America, not having an absolute obligation to pay the cash surrender value during the first year, would have granted the discounted value of the first year cash surrender value, as of the date of the gift. Discounting the cash surrender value at 3½%, the amount in the case of Prudential Policy No. 9114410 would be $56,076.94 on the date of gift (R. 18).

On March 11, 1936, taxpayer filed with the Collector of Internal Revenue, at Boston, Massachusetts, a federal gift tax return for the calendar year 1935, valuing the gifts when made in 1935 as $233,360.30, which was the cash surrender value at the time (R. 19).

The Commissioner increased the value of the gifts to $273,149.58 by using the total amount of the single premiums paid by the taxpayer. The Board of Tax Appeals held that the cash surrender value should be used and decided that there was no deficiency in gift tax for 1935 (R. 19). The Circuit Court of Appeals reversed (R. 41–48).

ARGUMENT

This case involves substantially the same question as is presented in *Guggenheim* v. *Rasquin,* No. 92, and we respectfully refer the Court to our brief in that case for a full discussion of the issues involved. However, the petitioner's brief herein makes three points which we will discuss briefly.

I

Petitioner contends that the standard of value to be applied under the gift-tax statute is fair market value. In the case of property for which a real market exists we agree that the market price is a satisfactory test of the value. But where, as here, there is no real market, we submit that some other test of value must be found.

The price fixed in a real market furnishes a satisfactory test of value because it evidences an agreement "between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell." Article 19, Treasury Regulations 79 (1933 and 1936 Editions). In such a market there is an opportunity for both buyers and sellers to appraise current conditions, and their divergent views with respect to present conditions and future prospects are reflected in the price agreed upon. We completely disagree with petitioner's theory that the insurance company represents such a market.

The amount which can be realized on an insurance policy when surrendered to the issuing company has been fixed in advance. Therefore the price is not affected by the current situation at the time of the transaction, and there is no opportunity for anyone to exercise his judgment.[1] The cancellation of an insurance policy under such circumstances furnishes no criterion of the "relative intensity of the social desire for it at that time * * * ." *Ithaca Trust Co.* v. *United States,* 279 U. S. 151, 155.

Moreover, the cancellation of an insurance policy is no more a sale than was the retirement of the bonds considered by this Court in *Fairbanks* v. *United States,* 306 U. S. 436. It is merely a surrender of the policy at a price fixed in advance by the insurance company. It is not a price which is available to both buyers and "sellers," because the insurance company has one price for the "seller" and a different price for the buyers. Since the transaction is not a sale and the insurance company does not represent a real market, we submit that the cash-surrender value is not a satisfactory test of value. This Court has so held. *Lucas* v. *Alexander,* 279 U. S. 573.

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[1] Petitioner in the *Guggenheim* case agrees (Br. 21) that the cash surrender value "is not the result of the interplay of supply and demand, but of a mathematical computation of the then present value of the policy by the insurer, who, by its contract, binds itself to pay the face amount."

Where the amount available in a recognized market is used as representative of value the price is the same whether the taxpayer be a buyer or a seller. While he can sell at the market price, he can also buy at the same price. Accordingly, while the market price represents the amount which he could secure upon a sale, it represents also the amount which he would be required to pay to duplicate the property. If, as petitioner contends, the insurance company represents the market, we submit that its buying price (cash-surrender value) is no better indication of the value of these policies than is the same company's selling price (the cost of duplicating the policies). If the question of value is approached from the standpoint of the investment which the donee would be required to make in order to secure at his own expense property identical with the gift, it is clear that in this case the gift has saved the donee the expenditure of the precise amount which the Commissioner has used as the value. The cost of duplication is no novel concept of value because, as stated above, the price quoted in a real market is the exact amount which the taxpayer would be required to pay if he were a buyer instead of a seller. Accordingly, we submit that petitioner's argument that the insurance company represents a market proves too much, for the insurance company is the source of the Commissioner's determination of the cost of duplication, and the transaction from which it is derived is a sale, not a cancellation.

II

We do not contend, as suggested by petitioner, for the relevancy of any special advantages conferred by the property which are important only to the particular owner. We have not suggested that the policies have any attributes which are important to the donor but not to the donee. We are not dealing here with family portraits, nor with shares of stock which enable the donor to control a particular corporation. We are dealing with insurance contracts which have investment value in addition to affording insurance protection. The donees are presumably interested in both.

III

In the sense that "value" represents the dollars-and-cents result procured from the application of a formula, we do not doubt that a question of fact is presented. But where, as here, the question presented is the proper method of measuring the value, we think it is clearly a question of law. Until the method is agreed upon, the basis for ascertaining the fact is in doubt. The proper method to be applied in determining the value of insurance policies was the question presented in *Lucas* v. *Alexander, supra,* and it was treated as a question of law. Here it was agreed (R. 25) that "the only question in controversy is as to the proper method of arriving at the values to be used as the measure of the gift tax with reference to a gift of certain life insurance policies." We think it is apparent that

where the question to be resolved is the proper method of valuation, the question is one of law.

It cannot be gainsaid that the word "value" is susceptible of diverse meanings and that there is no fixed general rule of law which determines the value of property. In view of the indefiniteness of the statute we think it was proper for the Treasury to promulgate regulations prescribing the method to be used for this peculiar type of property and that the only question here is whether the regulations which have been promulgated prescribe a permissible method of valuation.[2]

For the reasons stated above, there is no merit in petitioner's final contention that the Circuit Court of Appeals has erroneously reversed the Board of Tax Appeals upon a pure question of fact. The Board held (R. 19) that "the cash surrender value is to be used as the value of the gift." The Circuit Court of Appeals did not disagree merely with the figures obtained by the use of the cash surrender value. It decided that a different method should be used for determining the value. This was clearly within the competency of the Circuit Court

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[2] In *United States* v. *Ryerson*, 114 F. (2d) 150, 152–153, now pending in this Court on a writ of certiorari, No. 494, present Term, the Seventh Circuit said: "We are of the opinion that, for purposes of evaluating a fully paid life insurance policy, the common test of 'the fair market price or value' has no significance. In view of the peculiar type of property involved, the problem for the Commissioner was to devise a fair and appropriate measure of value which reasonably could be considered the amount of the gift."

of Appeals, and the contention that the court lacked authority to determine whether or not the Board had employed a correct method is without substance.

CONCLUSION

The decision of the court below is correct and should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 486.—October Term, 1940.

Madeleine D. Powers, Petitioner,
vs.
Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[February 3, 1941.]

Mr. Justice Douglas delivered the opinion of the Court.

The issue in this case is the same as that in *Guggenheim* v. *Rasquin,* No. 92, decided this day. Petitioner in November and December, 1935, purchased single-premium policies of insurance on her own life and late in December, 1935, irrevocably assigned them as gifts. The Commissioner determined a deficiency, claiming that the value of the policies for gift-tax purposes was the cost of duplicating them at the dates of the gifts, not the cash-surrender value as reported by petitioner. The Board of Tax Appeals held that the value of the gifts was their cash-surrender value. The Circuit Court of Appeals reversed. 115 F. (2d) 209. That judgment must be affirmed on the authority of *Guggenheim* v. *Rasquin, supra,* unless as claimed by petitioner the court below was precluded from substituting its judgment of value for that of the Board. *Helvering* v. *Rankin,* 295 U. S. 123, 131. But the question of what criterion should be employed for determining the "value" of the gifts is a question of law. See *Lucas* v. *Alexander,* 279 U. S. 573. Accordingly, the Circuit Court of Appeals was justified in reversing the decision of the Board as "not in accordance with law". Int. Rev. Code 1939, § 1141(c)(1); 53 Stat. 164.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.